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CHRISTIANITY AS A PART OF THE COMMON LAW OF THE UNITED STATES.

Is Christianity a part of the common law? This is the bone of contention of much recent useless discussion and equally absurd criticism. In a recent article in the *Albany Law Journal*, Mr. Linton D. Landrum discusses the question from the affirmative side with probably a little too much extravagance in the statement of some of his propositions. This article, however, provoked a criticism on the part of the editor of *The Lawyer and Layman* that reminds one more of an Ingersolian attack on Christianity than as a calm, unprejudiced discussion of a legal question. The criticism is rancid with an undercurrent of skepticism which breaks out now and then in personal attacks upon the author, who is facetiously nicknamed, "The Lord's Lawyer." It is to this criticism we desire to direct attention.

After a little skirmishing with Mr. Landrum personally, the author of this criticism plunges into a discussion of the question, taking for his text Mr. Blackstone's definition of common law as a "rule of civil conduct, which originated in the common wisdom and experience of society, and in time became an established custom, finally receiving judicial sanction in the courts of last resort." The author then recounts the essential elements of a valid custom stated by Mr. Blackstone, *i. e.*, that it should be immemorial, continued, reasonable, certain, compulsory, peaceably applied, and consistent with other customs. Having thus established his premises, the author proceeds triumphantly to his conclusion: "Now," writes our learned contemporary as he gives the editorial pen a victorious flourish, "are any of these rules of development applicable to the Christian religion? Have we no record of the origin of that institution? Has that origin ever been inquired into? And has that religion been 'continuously' and 'peaceably' applied and accepted without dispute as to its 'reasonableness' and 'certainty?' Has it been 'compulsory,' especially here in the United States, and always consistent with other judicially established customs? Come, now, Mr. Landrum, we are seeking for light, and will you, as the legal representative of the Almighty, please shed us a little? On the contrary, it appears to us from our finite pedestal, that these rules of development are just what the Christian religion cannot claim to have withstood. There is not a single one of the requirements quoted to which Christianity can lay claim. But we will not discuss that part. It is not necessary. Look and see. Read your Bible. Review the pages of religious and secular history, not only of this country, but of the world, for the last two thousand years, and it is decidedly plain that the Christian religion as an institution is not customary nor common law." And then our learned friend throws himself back in his easy arm-chair, conscious of having delivered a blow that has amazed both heaven and hell, and, incidentally, a little man in between.

We have no apologies to offer for Christianity, nor have we any patience with the man who, under the guise of a legal criticism, will ridicule a professional man because he carries his religious convictions even into the work of his profession. Abraham Lincoln, insisting on the efficacy of prayer before the battle of Gettysburg, and Justice Brewer, declaring the Sunday School a "step higher" than the supreme court must seem equally as ridiculous to our contemporary. Indeed, the fact of the business is, if the question were whether America was a Christian nation and this fact were to be determined by the religious convictions of our highest public servants, there could be but one answer.

The question, however, is whether Christianity is a part of the common law. This does not mean that the Bible [or any part of it is recognized as the law of the land. Nor does it mean that there is any connection between the state and church. Christianity is as easily distinguished from the book out of which it draws its life as from the organizations into which its life flows to find its concrete expression. Christianity, in the law, signifies that system of religious belief which recognizes God as the Supreme Creator and Christ as the supreme authority on all questions relating to things spiritual. All the common law does is to recognize Christianity

as the dominant religious conviction of the people. It does not give the sanction of law to any part of the bible, nor does it recognize any temporal authority in any organization that may be known as the church. As far as these things are concerned, all religions are equal before the law. But the religious convictions of the great majority of the people must be respected. And such is the reason of the rule at common law, for instance, in case of blasphemy. In the American and English Encyclopedia of Law, Vol. 2, p. 424, the author says: "Christianity, being recognized by law, therefore profanity, blasphemy against God, and profane ridicule of Christ or the Holy Scripture are punishable at common law." So, where one uttered the following words: "Jesus Christ was a bastard, and his mother must be a whore," it was held a public offense, punishable at common law. People v. Ruggles, 8 Johns. (N. Y.) 289, 5 Am. Dec. 335. A multitude of decisions might be cited in support of this well recognized proposition.

Of course, there can be no semblance of a state religion in this country. While a few of our states provide religious tests for office-holders, the majority of constitutions, as well as the federal constitution, provide that no such distinction shall ever be made, and the irresistible tendency of our national policy as well as the policy of nearly every state in the union is to thoroughly divorce church and state and to interfere as little as possible with the religious convictions of the people. Where, however, the moral sense of the people is violated, as in the case of mormonism with its polygamy or their feelings outraged, as in the case of blasphemy and profanity, exceptions are made, not based particularly on any valid reason, except that what the great majority thinks and believes on any subject must, of necessity, be respected. That, indeed, is the origin of the common law, and to that extent has the recognition of Christianity crept into it.

NOTES OF IMPORTANT DECISIONS.

RIGHT OF THE STATE IN TREASURE TROVE AT COMMON LAW.—As regards treasure trove the writers of authority agree that at common law the right of the crown extended to gold and silver found hidden in the earth or other private place, but not to articles which have been lost or abandoned, and that, in Blackstone's words, "a man that scatters his property into the sea or upon the surface of the earth, is construed to have absolutely abandoned his property." Thus it is only when the owner has concealed the treasure with the intention of reclaiming it when the opportunity arises, that the crown can assert its privilege against a finder. The position of the articles claimed by the crown in the recent case of Attorney-General v. Trustees of the British Museum strongly suggested the inference that they had been intentionally hidden away for security, and to rebut this inference the authorities of the British Museum could only suggest that they had been thrown into the sea, which was supposed then to have covered the spot in question, as a votive offering by some Irish sea king to some Irish sea god at some period between 300 B. C. and 700 A. D. But there was no evidence that the sea flowed over that spot within the period during which the treasure could have been in existence; it was not certain that there ever was an Irish sea god, or, if there had been one, that any Irish chief ever made offerings to him; and the case for the defendant was dismissed as consisting of "fanciful suggestions more suited to the poem of a Celtic bard than to the prose of an English law reporter."

EVIDENCE — JUDICIAL NOTICE OF A GLASS OF WHISKY. — Too much severe criticism should not be seriously indulged with respect to the action of the Missouri Court of Appeals in a recent case in expressing its intimate knowledge as to the exact quantity of the contents of a glass of whisky. In State v. Blands, 74 S. W. Rep. 3, that court simply held that a court will take judicial notice of the fact that a glass of whisky, sold at the price of ten cents, as charged in the information, contains less than three gallons. The court said in justification of its position: "The affidavit and information alike charge the quantity as less than three gallons, and the recital in the agreed facts is that defendant sold a glass of whisky at a price of ten cents. It is a matter of common knowledge that the quantity of whisky sold for such price, contained in such well-known drinking vessel and household utensil, must be less than three gallons; and a court must take judicial notice of such fact."

It might, of course, be suggested that such emphatic expression of opinion as to the size of a glass of whisky might lead one to harbor a suspicion that the members of the court were taking advantage of the occasion to express their indignation at the action of some purveyor of the gay spirits, who attempted to give them too radical an appreciation of the value of whisky, and with it a too lasting impression of the great disproportion existing between the size of a glass of whisky and the quantity of any other kind of liquid contained in a three-gallon vessel. At least, it is evident that the court's opinion shows a more than ordinary degree of familiarity with the del-

icate subject of its discussion. But for this, however, they certainly cannot be criticised, even if it would be improper to congratulate them on evidence thus given of their wide knowledge and experience in such a direction. Still, however, we see only one cause for alarm in the broad statement of the rule as announced by the court. To the innocent, virtuous, and unsophisticated judge, brought up strictly on the doctrine of teetotalism, who most probably has no idea of the difference between the size of a glass of whisky and a schooner of beer, would it not seem too much to expect of him to take judicial notice of the size of a glass of whisky? For the same rule certainly cannot be applied to beer for the reason that there is no regular size for a schooner; indeed, the size of a stein is often limited only by the capacity of a Teutonic stomach, and of that capacity no judicial notice would be possible as it has never yet been determined. We believe, therefore, that the rule announced by the Missouri Court of Appeals should be carefully restricted, not only to the term glass, but to the character of the spirits—whisky.

CORPORATIONS—RIGHT OF A CHRISTIAN SCIENCE CHURCH TO BE INCORPORATED.—No questions of law demand more tactful handling by the court than questions affecting the religious convictions of the individual citizen. In Pennsylvania such a question arose very recently out of the application for a charter to establish a place of public worship to preach the doctrine known as Christian Science. In denying the petitioners the right of incorporation the court, in its opinion, very delicately handled the religious phases of the question and decided the case on grounds of public policy. *In re* First Church of Christ, Scientist, 55 Atl. Rep. 536. The evidence showed that the purpose was not merely to establish a form of worship, but to educate persons for treatment of disease by inaudible prayer, and that nothing was necessary to qualify as such a teacher, except to study the system taught in the book of Mrs. Eddy, without any knowledge of anatomy, physiology, or hygiene; the theory of the system being that all diseases, even of a contagious character, were mere beliefs, and not real facts. The court held that the application for the charter was properly denied, as the principles and practice of the proposed organization were opposed to the general policy of the state in reference to the treatment and existence of diseases. In discussing this phase of the case the court speaking through Potter, J., said:

"It was the duty of the court below to refuse the charter, if, in the exercise of sound legal discretion, he found its purpose, in whole or part, included anything injurious to the community. Can it be said that there was an abuse of discretion in the finding in this case? We are not to consider the matter either from a theological or metaphysical standpoint, but only in its practical aspects. It is not a question as to how far prayer for the recovery of the sick may be efficacious. The common faith of mankind relies, not only upon prayer, but upon the use of means which knowledge and experience have shown to be efficient; and when the results of this knowledge and experience have been crystalized into legislative enactments, declarative of what the good of the community requires in the treatment of disease, and of the qualifications of those who publicly deal with disease, anything in opposition thereto may fairly be taken as injurious to the community. Our laws recognize disease as a grim reality, to be met and grappled with as such. To secure the safety and protect the health of the public from the acts of incompetent persons, the law prescribes the qualifications of those who shall be allowed to attempt the cure or healing of disease. It is not for the purpose of compelling the use of any particular remedies, or of any remedies at all. It is only designated to secure competent service for those who desire to obtain medical attendance. In certain diseases the individual affected may be the only one to suffer for lack of proper attention; but in other types, of a contagious or infectious nature, they may be such as to endanger the whole community. And here it is the policy of the law to assume control, and require the most effective known means to overcome and stamp out disease, which otherwise would become epidemic. In such cases, failure to treat, or an attempt to treat by those not possessing the lawful qualifications, are equally violative of the policy of the law. It may be said that the wisdom or the folly of depending upon the power of inaudible prayer alone, in the cure of disease, is for the parties who invoke such a remedy. But this is not wholly true; 'for none of us liveth to himself, and no man dieth to himself,' and the consequence of leaving disease to run unchecked in the community is so serious that sound public policy forbids it. Neither the law, nor reason, has any objection to the offering of prayer for the recovery of the sick. But in many cases both law and common sense require the use of other means which have been given to us for the healing of sickness and the cure of disease. There is ample room for the office of prayer, in seeking for the blessing of restored health, even when we have faithfully and conscientiously used all the means known to the science and art of medicine."

THE TAXATION OF CORPORATE FRANCHISES.

By Blackstone,[1] a franchise, in the English law, is defined as "a royal privilege or branch of the king's prerogative subsisting in the hands of a subject." The Supreme Court of the United States, in the early case of

[1] 2 Blackstone's Commentaries, 37.

Bank of Augusta v. Earle,[2] has defined a franchise as a special privilege conferred by government on individuals, which does not belong to the people generally, of common right; that is, by mere force of the common law. If a right to a franchise is asserted, some statutory enactment must be shown to give it being; else, it is not a franchise, but an usurpation. This may be said to be the generally accepted American definition of a franchise, being adopted substantially by every court and author of any note.[3]

A corporate franchise is the right of a corporation to exist and exercise the powers vested in it by its constating instruments,[4] and, strictly speaking, this is all that the expression "corporate franchise" includes. It is a thing separate and distinct from the tangible and visible property of the corporation or the other franchises that it may enjoy. In its every act, a corporation exercises its franchise.[5] Having been created by the law, it may enjoy other franchises, just as an individual may enjoy privileges of an extraordinary kind; or it may engage in a business of manufacture, trade or commerce without the bestowal of other valuable and important franchises. The popular conception of a corporation is that of a creature enjoying a multitude of franchises, or a single franchise of quite incomprehensible value, in derogation of the rights of all other members of the community. This is not so. It is rarely true that a corporation receives from the state more extensive privileges than the individual enjoys. The majority of corporations have only the franchise of corporate existence — a franchise which enables such bodies to engage only in business pursuits which were already within the compass of every member of the community. It is not untrue that a corporate franchise is a thing of value. This is demonstrated by the eagerness with which such franchises are sought, or by the vigorous manner in which they are defended when adverse proceedings are brought to extinguish them; but their value is largely a developed one.

A franchise enjoys the protection of constitutional guarantees designed to safeguard the interests of private property. It is subject to be taken by the power of eminent domain, but only upon compensation being made therefor.[6] It possesses all the attributes of property, and, indeed, is property,[7] and sometimes that of a very valuable kind. In the Dartmouth College Case,[8] Mr. Chief Justice Marshall said: "In respect to corporate franchises, they are, properly speaking, legal estates vested in the corporation itself, as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest. The property of a corporation rests upon the possession of its franchises; and whatever may be thought as to the corporators, it cannot be denied that the corporation has a legal interest in them." This class of property has very generally been held to be real estate, of the kind styled incorporeal hereditaments.[9] But as remarked by

[2] 13 Peters, 519, 595.

[3] Jersey City Gas Light Co. v. United Gas Improvement Co., 46 Fed. Rep. 265; Spring Valley Water Works v. Schottler, 62 Cal. 69, 106, 107; Londoner v. People, 15 Colo. 247, 25 Pac. Rep. 183; Denver, etc., R. Co. v. Denver City R. Co., 2 Colo. 682; Fietsam v. Hay, 122 Ill. 293; Bridgeport v. New York, etc., R. Co., 36 Conn. 251; State v. Morgan, 3 Gill. 11; Burton v. State, 28 La. Ann. 493; St. Louis Gas Light Co. v. St. Louis, etc., Gas Co., 16 Mo. App. 72; Green v. Knife Falls Boom Corporation, 35 Minn. 157; Curtis v. Leavitt, 15 N. Y. 170; Sellers v. Union Lumbering Co., 39 Wis. 527; Fon du Lac Water Co. v. City of Fon du Lac, 82 Wis. 322, 329; 3 Kent's Commentaries, 458; Angell & Ames on Corp. (10 Ed.), sec. 4; 14 Am. & Eng. Ency. Law (2 Ed.), 4, 5; 1 Rapalje & Lawrence's Law Dict. 543; 1 Bouvier's Law Dict. 839, 840; Anderson's Law Dict. 473; Black's Law Dict. 515.

[4] Bank of Augusta v. Earle, 13 Peters, 519; Spring Valley Water Works v. Schottler, *supra;* People v. Utica Insurance Co., 15 Johns. 357, 387; Peirce v. Emery, 32 N. H. 484, 507. "A corporation is itself a franchise belonging to the members of the corporation." See, also, Borroughs on Taxation, sec. 83.

[5] Spring Valley Water Works v. Schottler, *supra*; Bank of Augusta v. Earle, *supra*.

[6] In the Enfield Toll Bridge Co. v. Hartford, etc., R. Co., 17 Conn. 40, at p. 60, it is said: "The owner of such property may repose with security for its protection, under the wings of the constitution."

[7] Society for Savings v. Coite, 6 Wall. 594, 606; Provident Institution v. Massachusetts, 6 Wall. 611, 623; Spring Valley Water Works v. Schottler, *supra*; Porter v. Rockford, etc., R. Co., 76 Ill. 561, 573; West River Bridge Co. v. Dix, 6 How. 529; Veazie Bank v. Fenno, 8 Wall. 547; Wilmington, etc., R. Co. v. Reid, 13 Wall. 264; State Tax on Railway Gross Receipts, 15 Wall. 284, 296; Monroe Savings Bank v. City of Rochester, 37 N. Y. 367; State Board of Assessors v. Central R. Co., 48 N. J. L. 283, 288, 347; State Railroad Tax Cases, 15 Wall. 232; Commonwealth v. New England Tile Co., 13 Allen, 391. But it is not a proper subject of sale or lease without the consent of the sovereign power which created it. Arthur v. Commercial, etc., Bank, 17 Miss. 394, 48 Am. Dec. 719.

[8] Trustees of Dartmouth College v. Woodward, 4 Wheat. 417.

[9] Price v. Price's Heirs, 6 Dana, 107; The Enfield

Chancellor Kent, this is not done without some impropriety.[10] It partakes more of the nature of a license. In some states, by statute, for the purposes of taxation, such franchises are declared to be personalty; while it has been held, even in the absence of a statute, that such property is only personal and not real.[11]

All property, both tangible and intangible, over which the sovereignty of the state extends, is subject to the public burdens. This includes everything of value that exists by authority of the state or is introduced by its permission. The property of a corporation is not more sacred than the property of an individual, and is subject, therefore, to the same unvarying law. The intangible nature of a thing does not remove the element of property; and, therefore, it must be that franchises are proper subjects of taxation,[12] unless expressly, or by necessary implication, declared exempt from contributing to the expenses of government, for it is a fundamental maxim of the law of taxation that a tax, to be just, must be equal.

A franchise is a creation of property by government, developed and made of greater value by individual industry and enterprise. Originally, its value is rarely more than nominal. As a species of valuable property, it is essential to the maintenance of equality and justice that it contribute to the payment of the public dues. Yet it is also equally true that injustice may result by requiring an excessive contribution from corporate bodies on account of their franchises. A corporation has been said to be "without a soul," and I presume that the term is used somewhat synonymously with sense; but it must be remembered, in these days of evolution and popular clamor, that a corporation is a collection of individuals who do have souls and a sense of justice, who have rights susceptible of invasion by the state, and wrongs to be redressed. Ingenious men have insisted that such property should not be taxed because of its intangible nature and the attendant difficulty of arriving certainly at its fair valuation. But this contention has rightly found no favor in any of the courts. It is doubtless true that such property is of some value; and a possibility of erring in determining its value, when a practically correct result is attainable, is no valid reason for exempting it altogether. As was said by Mr. Chief Justice Caton, of the Supreme Court of Illinois: "To require it (absolute equality in taxation) is utopian, and not to be attained by mortals."[13]

A corporate franchise tax is a tax upon the privilege of corporate existence and the right to perform the functions for which the corporation was created. It is usually in the nature of an excise, being imposed according to some specific standard, changing as that standard of estimate changes; or it may be imposed in the form of a fixed, absolute charge against the corporation, wholly disconnected from any standard relating to the extent to which such franchise is exercised, or susceptible of being exercised. In some states it is a property tax, based upon the assessed value of the franchise as returned by the assessors—an *ad valorem* tax based upon a valuation determined in the same manner as in the case of ordinary tangible property. Neither form of taxation, it has been held, is subject to constitutional objections.

The definition of a franchise tax is easily comprehended and generally understood; yet what constitutes a franchise tax in the nature of an excise, based on some standard of estimate, is frequently somewhat difficult to determine.[13a] It closely resembles, and is frequently confused with, a tax upon the thing that is used as the basis of computing the tax on the franchise. If the tax is upon the franchise, although the amount thereof is meas-

Toll Bridge Co. v. Hartford, etc., R. Co., *supra*; Spring Valley Water Works v. Schottler, *supra*.

[10] 3 Kent's Commentaries, 459.

[11] People v. Commissioners of Taxes, 104 N. Y. 240, 247; State v. Anderson, 90 Wis. 550, 560.

[12] State Railroad Tax Cases, 92 U. S. 603; Porter v. Rockford, etc., R. Co., 76 Ill. 561, 573; Veazie Bank v. Fenno, 8 Wall. 547; Providence Bank v. Billings, 4 Pet. 562; Hamilton Co. v. Massachusetts, 6 Wall. 639; Osborne v. Bank of the United States, 12 Wall. 738. But in law a corporation's franchises and tangible property are an entirety, and the franchise may not be severed and sold apart from the tangible property for taxes due the state. State v. Anderson, 90 Wis. 550, 559.

[13] People v. Worthington, 21 Ill. 170.

[13a] Thus, in Bartlett v. Carter, 59 N. H. 105, a tax of one per cent laid upon savings banks, based upon the amount of deposits was held to be a property tax; while a similar law was held, by the Supreme Court of Maine, in the case of Jones v. Winthrop Savings Bank, 66 Me. 242, to impose a tax upon the corporate franchise and not upon the property of the corporation.

ured by non-taxable property, as, for example, United States bonds, it is not, upon that ground, invalid.[14] Or if measured by property that is otherwise taxable, the property so used to determine the amount of the franchise tax is not exempt from taxation because it is used as such a standard. Both are, at the same time, taxable. Where the tax is annexed to the franchise as a royalty for the grant of corporate existence, wholly irrespective of the kind of property that constitutes the capital of the corporation, it is clearly a franchise tax, and the nature of the property of the corporation is quite immaterial.[15]

While a franchise tax may be based upon a non-taxable standard of valuation, it is hardly necessary to say that it is beyond the province of the legislature legitimately to impose a tax on such non-taxable property under the guise of levying an excise. "Such legislation," it has been said, "would be a palpable invasion of a distinct and clearly defined constitutional restriction, and would substitute an unequal and arbitrary system of taxation upon property for one which was intended by the constitution to be equal and proportional. If the practical operation and effect of an assessment authorized by an act of the legislature would be to levy a tax on the property of certain individuals or corporations, from which all others are exempt, so as to throw upon a particular class a disproportionate share of the burdens of raising money for public purposes without an equivalent benefit, it would be the duty of the court to declare it to be an unauthorized act of legislative power, irrespective of the particular form in which the assessment might be imposed. The validity of the act would depend on the substantial nature and operation of its provisions, and not on the formal language in which they were expressed, or on the mode in which they were to be carried into effect."[16]

The value of a franchise is not accurately measured by the dividends that the corporation is able to declare and pay to its stockholders. Instead of being an accurate indication of the real value of the franchise, it is rather a criterion of the amount which the pecuniary condition of the corporation enables it to contribute in the form of taxes. It does, however, embody the highest idea of justice in taxation by taking as a basis the productiveness to the owner of the thing taxed. There is no constitutional objection in levying a tax upon the earnings of a corporation when the dividends taken from such earnings are the basis of an excise upon the franchise.[17] In a number of jurisdictions the gross or the net income has been adopted as the basis for computing the tax upon the franchise of the corporation.[18] That all, or a part, of such income may be derived from non-taxable property is no objection to the tax, it being otherwise valid. This is well illustrated by the case of Philadelphia Contributionship of Insurance etc. v. The Commonwealth.[19] In that case the appellant was a corporation engaged in the business of insurance in the state of Pennsylvania and organized under the laws of that state. By an act of the legislature, a franchise tax of three per cent. upon the net earnings was assessed upon such corporations, to be determined from a verified statement of the income received by them from all sources whatsoever. The appellant reported its whole income, as required by law, upon which the auditor charged a three per cent. tax. Two

[14] In Society for Savings v. Coite, 6 Wall. 594, 32 Conn. 173, the statute of Connecticut required savings societies to pay annually, into the state treasury, a sum equal to three-fourths of one per cent on the total amount of deposits on a given date. The appellant society had invested a part of its deposits in securities of the United States, declared by congress, in the act which authorized their issue, to be exempt from taxation by the states. It was held that as the tax was a franchise tax and not a tax on the property of the corporation, the value of the property being taken merely as a standard upon which to compute the franchise tax, the fact that the basis of such calculation was non-taxable property did not affect the validity of the tax. The same is true in the case of property in patent rights: Edison United Phonograph Co. v. State Board of Assessors, 57 N. J. L. 520, 31 Atl. Rep. 1019; Honduras Commission Co. v. State Board of Assessors, 54 N. J. L. 278, 23 Atl. Rep. 668; State v. Board of Assessors, 61 N. J. L. 461, 39 Atl. Rep. 638; Home Insurance Co. v. New York, 134 U. S. 594, 10 Sup. Ct. Rep. 593.

[15] Bank of Commerce v. New York City, 2 Black. 620, 629.

[16] Bigelow, C. J., in Commonwealth v. Hamilton Mfg. Co., 12 Allen, 298, 301.

[17] Phœnix Iron Co. v. Commonwealth, 59 Pa. St. 104; Commonwealth v. Pittsburg, etc., R. Co., 74 Pa. St. 83.

[18] Goldsmith v. Railway Co., 62 Ga. 468; Wright v. Railway Co., 64 Ga. 783; People v. Supervisors, 18 Wend. 605; Commonwealth v. Ocean Oil Co., 59 Pa. St. 61.

[19] 98 Pa. St. 48. See Cooley on Taxation, p. 383.

considerable items of this income were derived from loans of the United States and of the state of Pennsylvania, the latter by the terms of the acts which authorized their issue being expressly made payable free from state taxes. It was objected by the corporation that so much of the franchise tax as was based upon the above items was invalid, as being a tax upon the income derived from the bonds. But the court said: "It may be conceded that the bonds, as such, are not taxable by the commonwealth; but the tax in question is not laid on the bonds. It is a tax on the corporate franchise of the plaintiff in error, measured by its net earnings. The right of the state to impose a tax on the franchise of any corporation that is indebted to it for existence and protection, is too clear for argument. If the right exists, as it undoubtedly does, the manner of its exercise must be left to the wisdom of the legislature; and, perhaps no standard or measure of taxation can be adopted that will operate more justly and equitably than a per centum on net earnings or income. * * * There is an obvious difference between a direct tax on the property of a corporation and a franchise tax measured by its earnings which, proximately, at least, represent either the value of the franchise granted or the extent of its exercise. Its net earnings or income are resorted to simply as a just measure of the tax to be paid for the enjoyment of its corporate franchise."

By the "commerce clause" of the federal constitution, and the decisions that have grown up under it, the states are powerless to regulate, or in any manner to interfere with interstate or foreign commerce.[20] This is true in matters of taxation. While this is established quite beyond controversy, it does not forbid the state to tax the franchise granted by it to a corporation engaged in interstate commerce.[21] And in arriving at the value of such a franchise, the taving state is entitled to consider the increased value of the franchise granted by it resulting from the grant of a similar franchise by another state to the same corporation. If the franchise is property within the jurisdiction of the taxing state, it is immaterial what elements produce the value of the thing taxed; for the state is entitled to tax all property within its jurisdiction.[22]

A graduated tax, to be determined by the amount of gross receipts derived partly or wholly from interstate commerce, is not beyond the power of the several states.[23] In the case of the state tax on railway gross receipts,[24] Mr. Justice Strong said: "No doubt every tax upon personal property, or upon occupations, business or franchises, affects, more or less, the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution. We think, also, that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations the states are not obliged to impose a fixed sum upon the franchises or upon the value of them; but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise. * * * A power to tax to this extent may be essential to the healthy existence of the state governments, and the federal constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence."

Where no provision is made for assessing an excise tax upon a corporate franchise, a property tax based upon the assessed value of the franchise may be laid against it as a separate item of taxation or as a part of the aggregate wealth of the corporation. It has been insisted in such a case that the legislature, not having specifically provided for its taxation, must intend that it be exempt from the common burdens. But this ignores an elementary principle of the law of taxation, that where one claims certain property to be exempt he must point to that provision of the law expressly or by necessary implication ex-

[20] Cooley's Constitutional Limitations (6 ed.), p. 595, and cases cited.

[21] Louisville & Jeffersonville Ferry Co. v. Commonwealth (Ky.), 57 S. W. Rep. 624. (Not yet published in official reports.) Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 206, 5 Sup. Ct. Rep. 829, 29 L. Ed. 163; Philadelphia S. S. Co. v. Pennsylvania, 112 U. S. 326, 7 Sup. Ct. Rep. 1118, 30 L. Ed. 1200.

[22] Cooley's Constitutional Limitations (6 ed.), pp 587, 588.

[23] Louisville & Jeffersonville Ferry Co. v. Commonwealth, *supra*.

[24] State Tax on Railway Gross Receipts, 15 Wall. 284, 293.

empting it. A general tax law is sufficiently broad to cover this class of property, for, after all, it is only property, subject to the general laws applicable to all property.[25]

A tax upon the franchise of a corporation is not a penalty upon corporate existence, but a reasonable return to the state for the privilege, not alone of existing as a corporation, but of exercising its franchise of corporate powers, as a means of producing returns. If, therefore, by an act of the state itself, or its agencies, a corporation is rendered unable to exercise its franchise, and is required to remain dormant, no tax is assessable against its franchise during such period.[26] It is immaterial that the corporation is enabled to declare dividends during such period of enforced inaction, out of earnings arising from an increment of its property. The franchise is nonproductive and temporarily extinguished, and, therefore, of no value upon which to compute a tax.

While the power of taxation is co-extensive with property and essential to the support and maintenance of government, the state may, by contract, release her power of taxation by a provision in the corporate charter, based upon an amount paid at the time of the grant of corporate existende. In such a case, the amount so paid is deemed the price paid for the franchise.[27] While quite within the power of a state, it has usually proven an unwise policy. Nevertheless, it has been and now is frequently pursued because of the allurement of present and immediate income to the state.

It will be impossible to give here the methods which the various states have adopted, of reaching this extensive class of modern and valuable property. Some are referred to in the notes.[28] Experience has demonstrated that the means of a practical policy must be as various as corporate interests are diverse. If the nature of a corporation is such that the improvement of its permanent property is peculiarly advantageous to its stockholders, an excise measured by dividends would greatly free its franchise from taxation. In such a case, other conditions concurring, the better means would be that of a tax based upon its gross receipts. Upon the other hand, if the interests of all concerned are best subserved by immediate distribution of profits, the corporate property offering no field for investment in permanent improvements, a tax upon dividends or net income would reach the case equally well. Again, while a heavy excise upon the franchise of a corporation engaged in a competitive business is usually productive of unjust discrimination against the corporation, because of the advantage which individuals derive from the freedom from such a charge, it may be an eminently proper tax upon a corporation engaged in a business which is naturally a monopoly.[29] Although the power of the state in matters of taxation is plenary, as above suggested, not all methods are advisable or practicable.

The general class to which a corporation belongs must not alone determine the action of a state in matters of this nature; but the particular environment of such corporation and the stage of its development must be largely considered in the framing of an effective tax law. A tax on the franchise of a railway corporation in the state of New York, determined by a particular standard, may produce the desired results; while in some of the western states it would be wholly inadequate when applied to the same class of corporations.

During the last two decades much improvement has been made in the tax laws of the American states. The field is yet open for improvement. A scientific system of taxation

[25] Commercial Electric Co. v. Judson, 21 Wash. 49, 56 Pac. Rep. 829; State v. Anderson, 90 Wis. 550, 63 N. W. Rep. 746; Commonwealth v. Delaware, etc., R. Co., 165 Pa. St. 44; Commonwealth v. Van Horn, 188 Pa. St. 169, 189. See contra. Water Co. v. Paterson, 56 N. J. L. 471; Bridge Co. v. Distret, 5 Mackey 376.

[26] People v. Jerome Park Villa Site & Improvement Co., 58 N. Y. Supp. 254, 41 App. Div. 21.

[27] Morris, etc., R. Co. v. Haight, 35 N. J. L. 40; Farmers' Bank v. Commonwealth, 6 Bush (Ky.), 127; Gordon v. Appeal Tax Court, 3 How. 133; 1 Desty on Taxation, sec. 76.

[28] In determining the amount of a franchise tax upon insurance corporations, the net aggregate value of all policies in force at a given period has been taken as a basis of calculation, and approved by the court of Massachusetts in the case of Connecticut Mutual Life Insurance Co. v. Commonwealth, 133 Mass. 161. See Gleason v. McKay, 134 Mass. 419. A tax in the nature of a franchise based upon the length of telegraph and railway lines within the state as compared with the whole length of such lines, is a proper tax, notwithstanding such corporations may be engaged in interstate commerce. Western Union Telegraph Co. v. Atty. Gen., 125 U. S. 530; Massachusetts v. Western Union Telegraph Co., 141 U. S. 41; Cleveland, etc., R. Co. v. Backus, 154 U. S. 439; Western Union Telegraph Co. v. Norman, 77 Fed. Rep. 13.

[29] Cooley on Taxation, p. 34.

yet lies in the future. But the concurring facts of past improvement and present sober study of such questions as the subject suggests and presents are a pleasing indication that the present crudity of laws of such importance may soon be a matter of only historical interest.

GLENDA BURKE SLAYMAKER.

Anderson, Indiana.

EQUITY—JURISDICTION OF BILL OF DISCOVERY.

WRIGHT v. SUPERIOR COURT OF SANTA CLARA COUNTY.

Supreme Court of California, June 26, 1903.

Under Civ. Code, tit. "Specific and Preventive Relief," specifying the cases in which preventive relief may be granted, and section 3423, declaring that an injunction cannot be granted to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded unless to prevent a multiplicity of suits, where an action is pending in one superior court another superior court has no jurisdiction to entertain a bill of discovery and to enjoin proceeding in the first action, except to prevent a multiplicity of suits.

Shaw, J., dissenting.

In Banc. Petition for a writ of prohibition by William H. Wright and others against the superior court of the county of Santa Clara and W. G. Lorigan, judge thereof. Peremptory writ granted.

VAN DYKE, J.: The petition for the writ in this case states that on the 28th of March, 1902, Myra E. Wright, one of the petitioners herein, commenced an action as plaintiff against the Jersey Island Packing Company, a California corporation, for the purpose of recovering $85,000 advanced by her to the said corporation, and which it had failed and refused to repay; that the defendant in said action, being served, appeared and answered therein, denying said indebtedness, and joining issue with the facts alleged in the complaint; that thereafter, by an order of said superior court, said action was set for trial for Monday, November 17, 1902, at the hour of 10 o'clock; that when said cause was called for trial on that day the attorneys for the respective parties, plaintiff and defendant, announced themselves ready for trial, and thereupon, without any objection upon the part of the defendant, the Jersey Island Packing Company, the judge of said Department 5, in which the cause was set for trial, directed the clerk of said court to call a jury for the trial thereof, and the clerk thereupon drew from the trial jury box of said department 12 jurors, who answered to their names, and took their seats in the jury box. Immediately thereafter one of the attorneys for said defendant served upon the petitioners herein, William H. Wright and Walter H. Linforth, a copy of the complaint and summons, and the injunction in the action brought by said Jersey Island Packing Company in Santa Clara county against said plaintiffs in said action, then on trial in the superior court of San Francisco, to-wit: Myra E. Wright and William H. Wright, for the purpose, among other things, of restraining said Myra E. Wright and her counsel from proceeding with the trial of said action for recovery of the said $85,000 against the said Jersey Island Packing Company; that none of the petitioners herein or their attorneys had any knowledge or notice of the commencement of said action or issuance of the injunction therein until the service of the papers as aforesaid in Department 5 of the superior court of the city and county of San Francisco; that the office and principal place of business of the said Jessey Island Packing Company is, and always has been, the city and county of San Francisco, and that the residence of said Myra E. Wright and William H. Wright has been for more than a year last past continuously, and is still, in the said city and county of San Francisco, which fact was well known to said Jersey Island Packing Company and to its attorneys at the time of the commencement of the action so brought in said superior court of Santa Clara county. The said action brought in Santa Clara county by the Jersey Island Packing Company against the petitioners, Myra E. Wright and William H. Wright, was in the nature of a bill of discovery to obtain the testimony of the said Myra E. Wright, alleging that the said testimony to be obtained was material and necessary for the defense in the action in the superior court of the city and county of San Francisco then pending. It is further alleged that the said William H. Wright and Myra E. Wright appeared in the said action brought in the county of Santa Clara, served and filed their demurrer therein, and at the same time served upon the attorneys of the said Jersey Island Packing Company their notice of motion for a change of the place of trial from said superior court to the superior court of the city and county of San Francisco, and at the same time served and filed their demand for the said change of the place of trial, and also a proper affidavit setting forth the residence both of the plaintiffs and defendants in said action to be in the city and county of San Francisco; that the judge of said superior court of Santa Clara county, upon the affidavit of one of the attorneys for the said Jersey Island Packing Company, made an order directing the petitioners to appear before him at his court room in the city of San Jose on the 21st day of November thereafter, to show cause why they should not be punished for contempt for violating the injunction order heretofore referred to by proceeding with the trial of the case in the superior court of the city and county of San Francisco as aforesaid. The injunction order referred to commanded the petitioners, Myra E. Wright and William H. Wright, as plaintiffs in said action, to refrain from proceeding with the trial by the impanelment of a jury, examination of witnesses, or in

any manner whatsoever in said action against the Jersey Island Packing Company, defendant, "now and heretofore pending in the superior court of the state of California in and for the city and county of San Francisco, and assigned to Department 5 of said superior court."

From these facts, which are admitted by the demurrer, two main questions are presented for consideration: First. Under the present condition of the practice, is the so called "bill of discovery" as a separate proceeding still in force? Secondly. Is it competent for one superior court to enjoin the trial of an action pending in another superior court, properly brought therein, and of which it has jurisdiction?

A bill of discovery in the old chancery courts was an auxiliary or assistant proceeding to the courts of law, and arose from the defects in the courts of common law to compel complete discovery by the oath of the parties in the suit. 2 Story, Eq. Jur. §§ 1480–1484. Modern legislation, however, has greatly interfered with the practical exercise of the auxiliary jurisdiction for discovery by introducing simpler and more efficacious methods in its stead, and thus rendering resort to it unnecessary, and even inexpedient. In some of the states a suit for discovery, properly so called, is expressly abolished by statute, and in all of them is utterly inconsistent with both the fundamental theory and with the particular doctrines and methods of the reformed procedure. Pom. Eq. § 193. Even under the old system it was laid down as a rule that courts of equity would not entertain a bill for discovery to assist a suit in another court, if the latter of itself was competent to grant the same relief; for, as said, in such a case, the proper exercise of jurisdiction should be left to the court where the suit was depending. 2 Story, Eq. Jur. § 1495. In this state, as well as most of the other states, at this time, the parties to the action, as well as other interested persons, may be witnesses compellable to give testimony in an action or proceeding (Code Civ. Proc. § 1879), and for disobedience to subpœna or refusal to be sworn or answer as a witness the party to the action may be punished as for contempt, and his complaint or answer may be stricken out (*Id.* § 1991). Under the present conditions, therefore, the auxiliary proceeding of a bill for discovery in a separate court is altogether unnecessary, as the court in which the action is to be tried possesses all the necessary power to attain the same result. Full relief can now be obtained and granted in the same tribunal. Hence there is no longer any reason or necessity for a separate proceeding in another forum for the purpose of aiding the court in which the action is pending in the trial of the cause, and it is a legal maxim that, when the reason of a rule ceases, so should the rule itself; and therefore, although the separate proceeding by bill of discovery has not been expressly abolished in our state, as it has been in most of the others, under our system of courts and judicial procedure it could not well exist in this state. If the trial of an action before a court of competent jurisdiction in the city and county of San Francisco can be interrupted by filing a so-called bill of discovery in Santa Clara county, any action pending or on trial in any part of the state may be suspended by a like collateral proceeding commenced in another county, and in the most distant part of the state; and the action thus suspended in the midst of a trial might be tied up a year or two, until demurrers and motions for change of venue in such collateral proceedings could be disposed of, and appeals from the judgment therein, and from its various branches, could be finally determined. Such a practice would be simply intolerable. Even in England, whence our system of jurisprudence was originally borrowed, the distinction between courts of equity and courts of law has been abolished, and there is, therefore, in that country no longer any necessity for the so-called bill of discovery to aid another court in the trial of an action at law.

Because the constitution confers upon the superior court jurisdiction in cases of equity, it does not follow that the legislature is thereby prohibited from regulating the practice and proceedings in such cases. At the time Judge Story compiled his work on the subject of equity pleadings, he said: "Equity pleading has, indeed, now become a science of great complexity, and a very refined species of logic, which it requires great talents to master in all its various distinctions and subtle contrivances, and to apply it with sound discretion and judgment to all the diversities of professional practice." Story, Eq. Pl. § 13. No one would pretend that the old mode of practice and forms of pleading in equity are in force in this state, any more than the old forms of pleading at common law. From the beginning, in this state, the practice, pleadings, and proceedings in equity, as well as at common law, have been regulated by statute. We have but one form of action, and that applies to equity as well as law; and the pleadings in all civil actions, and the rules by which their sufficiency is determined, are prescribed by the code. Code Civ. Proc. § 421. We have no so-called bill in equity—either for discovery or for any other relief—with its formal parts according to the old practice referred to by Judge Story. Instead thereof we have the same form of complaint as in actions at law, merely consisting of "a statement of the facts constituting the cause of action in ordinary and concise language." *Id.* § 426. If the legislature can thus radically change the pleadings and practice in equity proceedings, as it has done, it cannot be doubted that it possesses the power also to regulate the practice of granting preventative relief, including injunctions. Under the title of "Specific and Preventive Relief" in the Civil Code it is declared "Specific or preventive relief may be given in the cases prescribed in this title, and in no others." Then follow the cases specified, being three in number,

none, however, relating to the case at bar; and by section 3423, under the same title, it is declared that an injunction cannot be granted "to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings." Civ. Code, §§ 3366, 3423. It is not pretended, nor could it well be, that the injunction in this case was to prevent a multiplicity of actions or proceedings. On the other hand, it added another action to the one already pending. And in the action then pending in the city and county of San Francisco the testimony sought to be had in the action or proceeding in the county of Santa Clara by the so-called bill of discovery, could have been taken and used on the former action. Therefore the action or proceeding now under consideration was not only unnecessary, but expressly prohibited by the code. In Spreckels v. Hawaiian Com. etc., Co., 117 Cal. 377, 49 Pac. Rep. 353, these sections of the code were fully considered, and it was there held that the provisions of the civil code upon the subject of specific and preventive relief are designed to cover the whole subject, and are not mere rules of procedure, but define and regulate rights, and that the constitutional grant to the superior court of jurisdiction in all cases of equity was not intended as a limitation upon the power of the legislature to regulate the rights of persons; and the legislature may either create new rights under which new cases in equity may arise, without endangering the jurisdiction of the courts of equity, or may cause some rights to cease to exist, so that certain cases which courts of equity once entertained can no longer arise, without diminishing the jurisdiction of the superior courts in all cases in equity. The superior court of Santa Clara county was without jurisdiction to enjoin the action then pending in the city and county of San Francisco, or the parties plaintiffs, respondents herein, from prosecuting said action.

A peremptory writ of prohibition is granted as prayed.

SHAW, J., dissenting: The proceeding is for prohibition. By the terms of the statute the writ cannot issue unless the court below is acting without jurisdiction. This is the controlling factor in the case. A failure to state facts sufficient to constitute a cause of action—or, in other words, to state facts which show that the plaintiff has a right of action—must not be confused with a lack of jurisdiction. The first proposition has no bearing at all on the decision of the case, while the latter is essential to the decision of the majority of the court. And yet the decision is based on the first proposition entirely, as will be shown.

The sole question is whether or not the superior court has jurisdiction to entertain the proceeding known in equity jurisprudence as a bill of discovery. It is, of course, conceded that this proceeding constituted one of the branches of equity jurisdiction at the time of the adoption of the constitution of this state in 1849. Article 6, § 6, of that constitution, conferred upon the district courts "original jurisdiction in all cases in equity." Under this clause this court decided that "the equity jurisdiction with which our district courts are invested under the constitution is that administered in the High Court of Chancery in England." People v. Davidson, 30 Cal. 391; Rosenberg v. Frank, 58 Cal. 400. The constitution of 1879 in the same language conferred the same jurisdiction on the superior courts (article 6, § 5), and, upon a familiar principle of construction, the provision is not to be continued in force, with the superior courts substituted as the recipients instead of the former district courts. The constitution, therefore, gives to the superior courts all the jurisdiction of courts of equity as it formerly existed. It necessarily follows that the superior courts have jurisdiction of bills of discovery.

The majority of the courts seek to escape from this inevitable conclusion by resort to the provisions of section 3423, Civ. Code, to the effect that no injunction shall be granted to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded." Of course, it must be admitted that, if this provision of statute law acts upon the jurisdiction of the court as given by the constitution, the law is unconstitutional. The force of this proposition is sought to be evaded by the statement that it does not act upon the jurisdiction of the court, but that it is a limitation upon the rights of persons to maintain an action. It was on this ground that the section was held valid, in Spreckels v. Hawaiian Co., 117 Cal. 377, 49 Pac. Rep. 353. But it will be seen that, if the section is upheld on this ground—and it can be upheld on no other—we at once leave the question of jurisdiction, which is the only question in the case, and enter upon an inquiry whether or not the plaintiff in the injunction suit has stated facts sufficient to show that he personally has a right of action, which is an inquiry foreign to the case in hand. The majority opinion rests for its support on its conclusion that this section, by depriving a plaintiff of a right of action, ousts the court of its jurisdiction. In a proceeding for a writ of prohibition it can make no difference whatever whether the complaint in the proceeding sought to be prohibited states a cause of action or not. The court has jurisdiction of the subject-matter, as well upon a bad pleading as upon a good one. And, even if the defect is of such character that an amendment to make it good is impossible, still the point is one to be raised on appeal and not in prohibition. This court is beset with enough applications for the exercise of its original jurisdiction at the best, and it ought not to relax in the least the rigidity of the technical rules with which that jurisdiction is surrounded and limited.

On the score of authority the opinion of the majority has no substantial support. They are

overwhelmingly to the effect that the statutes making parties competent witnesses, requiring interrogatories to be answered before the trial, and for the production of papers, do not oust equity courts of their pre-existing jurisdiction to entertain suits of discovery. Post v. Toledo, etc., Co., 144 Mass. 341, 11 N. E. Rep. 540, 59 Am. Rep. 86; Russell v. Dickeschied, 24 W. Va. 61; U. P. R. R. Co. v. Mayor, 71 Md. 238, 17 Atl. Rep. 933; Millsaps v. Pfeiffer, 44 Miss. 805; Howell v. Ashmore, 9 N. J. Eq. 91, 57 Am. Dec. 371; Shotwell v. Smith, 20 N. J. Eq. 81; Cannon v. McNab, 48 Ala. 99; Shackelford v. Blankhead, 72 Ala. 476; Handley v. Heflin, 84 Ala. 600, 4 So. Rep. 725; Wood v. Hudson, 96 Ala. 471, 11 So. Rep. 530; Elliston v. Hughes, 1 Head (Tenn.), 227; Grimes v. Hilliary, 38 Ill. App. 246; Kendallville Refrigerator Co. v. Davis, 40 Ill. App. 616; Ames v. N. J. F. Co., 12 N. J. Eq. 68, 72 Am. Dec. 385; British Empire Co. v. Somes, 3 Kay & J. 433; Colgate v. Compagnie, etc. (C. C.), 23 Fed. Rep. 82; Pom. Eq. Jur. § 193; 6 Ency. Pl. & Pr. p. 740.

There are a few cases which, without much consideration, use language which, if not considered with reference to the manner in which the point arose, might be understood as denying this jurisdiction to courts of equity under modern conditions. But it will be found, almost without exception, that they are cases where the inquiry was not with respect to the jurisdiction of the court, but with regard to the existence of an ample remedy at law, which made it unnecessary to resort to the aid of equity. Bond v. Worley, 26 Mo. 254; Hall v. Joiner, 1 S. Car. 190; Rindskopf v. Platto (C. C.), 29 Fed. Rep. 132; Heath v. Erie Ry. Co., 9 Blatchf. 316, Fed. Cas. No. 6,307; Riopelle v. Doellner, 26 Mich. 102; Preston v. Smith (C. C.), 26 Fed. Rep. 884; Reddington v. Lanahan, 59 Md. 440; Paton v. Majors (C. C.), 46 Fed. Rep. 210; Babbott v. Tewksbury (C. C.), 46 Fed. Rep. 86; Drexel v. Berney (C. C.), 14 Fed. Rep. 268. But in Brown v. Swann, 10 Pet. 500, 9 L. Ed. 508, and *Ex parte* Boyd, 105 U. S. 657, 26 L. Ed. 1200, it was conceded that the jurisdiction in equity still exists, though there is now seldom occasion to call for its exercise. If the jurisdiction exists in the superior court, there is no ground for the issuance of a writ of prohibition. The question of the necessity for the exercise of the jurisdiction, or the right to maintain a suit for discovery, as a personal right, can only arise on appeal, or in some other form of attack where those questions are involved.

NOTE.—*Under the Present Condition of Practice is the So-called "Bill of Discovery" as a Separate Proceeding Still in Force?*—The court in the principal case gives an answer in the negative which accords with the idea generally prevailing in all code states. In Ency. of Pl. and Pr., vol. 6, p. 736, it is said: "Owing to statutory provisions in England, and in nearly all the United States, which authorize examination of parties to a suit as witnesses, and provide that either party may be compelled on application and notice to produce books and documents for inspection, bills of discovery are not used with such frequency as formerly. In some states the statute expressly abolishes bills of discovery. Citing New York, North Carolina, North Dakota, South Carolina, South Dakota and Wisconsin. In other states the statutes provide that the statutory remedies shall be concurrent with the equitable remedies. (Georgia and Virginia.) In other jurisdictions where the statute does not expressly abolish the jurisdictions of the courts of equity in regard to discovery, there are rulings both ways on the question whether a bill of discovery can be mentioned. Thus in Alabama, Maryland, Massachusetts, Mississippi, New Jersey, Pennsylvania, Tennessee, West Virginia and Illinois a bill of discovery may still be maintained. * * * On the other hand, it has been held in Missouri and South Carolina that bills of discovery cannot be maintained. In Texas it has been held they are superceded by the remedies given by statute, and in Ohio declared to be practically obsolete. In the federal courts it is permitted, but the practice is discountenanced. In Maine and Michigan the right is recognized but restricted to cases specially provided for by statute."

"In conclusion" (6 Ency. of Pl. & Pr. p. 740) "it may be stated that the correct doctrine, deducible from this mass of conflicting decisions, both on principle and on the weight of authority, is that the jurisdiction of courts of equity to entertain bills of discovery is not abrogated by these statutes, unless they contain express provisions to that effect."

While this may be true, it seems that where adequate provision is made for discovery, etc., in ordinary common law actions, the better doctrine certainly would be not to permit a separate bill in discovery to be filed, simply for the reason that there is no use to have two actions where one will suffice, and this idea is enforced when we remember that a bill of discovery could never be maintained in a proceeding in any court which could originally compel a discovery. 6 Ency. of Pl. & Pr. 734. The court, however, in the principal case, was aware of the weight of authority being in favor of the doctrine that statutes making parties competent as witnesses, requiring interrogatories to be answered before trial, and for the production of papers, did not oust equity courts of their jurisdiction to entertain suits of discovery.

In the dissenting opinion the following cases are cited: Post v. Toledo, etc., Co., 144 Mass. 341, 11 N. E. Rep. 540, 59 Am. Rep. 86; Russell v. Dickeschied, 24 W. Va. 61; Union Pacific R. Co. v. Mayor, 71 Md. 238, 17 Atl. Rep. 933; Millsaps v. Pfeiffer, 44 Miss. 805; Howell v. Ashmore, 9 N. J. Eq. 91, 57 Am. Dec. 371; Shotwell v. Smith, 20 N. J. Eq. 81; Cannon v. McNab, 48 Ala. 99; Shackelford v. Blankhead, 72 Ala. 476; Handley v. Heflin, 84 Ala. 600, 4 So. Rep. 725; Wood v. Hudson, 96 Ala. 471, 11 So. Rep. 530; Elliston v. Hughes, 1 Head (Tenn.), 227; Grimes v. Hilliary, 38 Ill. App. 246; Kendallville Refrigerator Co. v. Davis, 40 Ill. App. 616; Ames v. N. J. F. Co., 12 N. J. Eq. 68 72 Am. Dec. 385; British Empire Co. v. Somes, 3 Kay & J. 433; Colgate v. Compagnie, etc. (C. C.), 23 Fed. Rep. 82; Pom. Eq. Jur. 193; 6 Ency. Pl. & Pr. 740; Bond v. Worley, 26 Mo. 254; Hall v. Joiner, 1 S. Car. 190; Rindskopf v. Platto (C. C.), 29 Fed. Rep. 132; Heath v. Erie Ry. Co., 9 Blatchf. 316, Fed. Case No. 6,307; Riopelle v. Doellner, 26 Mich. 102; Preston v. Smith (C. C.), 26 Fed. Rep. 884; Reddington v. Lanahan, 59 Md. 440; Paton v. Majors (C. C.), 46 Fed. Rep. 210; Babbott v. Tewksbury (C. C.), 46 Fed. Rep. 86; Drexel v. Berney (C. C.), 14 Fed. Rep. 268; Brown

v. Swamm, 10 Pet. 500, 9 L. Ed. 508, and *Ex parte* Boyd, 105 U. S. 657, 26 L. Ed. 1200.

Notwithstanding the weight of authority it seems to me the conclusion of the court in the principal case on this question is preferable.

Is it Competent for One Court to Enjoin Another Court in the Trial of an Action Pending in said Court, Properly Brought Therein, and of which it has Jurisdiction?—If the courts are of equal jurisdiction, certainly no. And it is stated in the text-books that "The court will exercise its authority to issue writs of prohibition to courts of inferior jurisdiction, only in cases where such courts clearly exceed their jurisdiction, or attempt to usurp a jurisdiction belonging to some other forum." 2 Spelling on Extra Relief, sec. 1723. In another place, sec. 1725, the same author says: "But the sounder doctrine, and that sustained by the great preponderance of authority, as to the effect that prohibition only lies where the court either lacks jurisdiction of the subject-matter, or having jurisdiction, exceeds it in some incidental matter, or in rendering judgment, and no appeal or writ of error or other remedy is available at all, or if available is inadequate to meet the emergencies of the case, or to afford the redress to which the injured party is entitled." In another place, sec. 41, the same author says: "Where courts of law and equity possess concurrent jurisdiction over the subject-matter of the controversy, the latter will not interfere by injunction writs on actions already brought and pending in the court of law, no obstacle existing to obtain complete relief in the action." Upon this branch of the case, it certainly seems the decision of the court in the principal case was right. The Superior Court of San Francisco and the Superior Court of Santa Clara were courts of equal jurisdiction, and the mere fact that the common law side of the San Francisco court was invoked, would surely not permit it to be controlled by the equity side of the Santa Clara court.

Where courts of common law jurisdiction can grant adequate relief, courts of equity never interfere. It was only the inability of courts of common law to grant relief that caused equity courts to come into existence. Under the code of civil procedure, while common law and equitable actions still remain, yet they are all under one name and brought in one court. And it rarely happens that a suitor will fail to get the relief in the court in which the action is brought, to which the facts entitle him, be the same under the common law or in equity. On all questions the decision of the court in the principal case commends itself as being just and right and should be followed.

JETSAM AND FLOTSAM.

THE BAR OF EARLY ARKANSAS.

The following is a recent and very interesting address delivered by Hon. George B. Rose, president of the Arkansas Bar Association, which will appeal not only to the bar of Arkansas, but to lawyers everywhere, who will recognize in the struggles here related their own early efforts. Mr. Rose said in part:

"Arkansas was formed into a territory and admitted into the union as a state during one of the most strenuous periods of our country's life. A considerable era of peace and of unexampled prosperity had caused the young nation to feel its strength. For some years it had owned the vast untrodden wilderness beyond the Mississippi, but now it felt that it had the power and the energy to take possession. And it was a time when the rapture of the strife and the love of adventure were strong in the hearts of men. Lord Byron was still the favorite poet, Sir Walter Scott the favorite novelist. Napoleon's stupendous career was still fresh in the memory of all. Hearts were in a ferment, minds in a state of exaltation. Men felt that the star of empire was taking its way westward, and many of the ablest and most of the boldest of the young men of the country determined to follow in its course. Conscious of their abilities and of their courage, each dreamed of ruling some new commonwealth that was springing from the wilds. But to their surprise, when they reached the field of their anticipated triumphs, they found there foemen worthy of their steel, fired with a like ambition.

"As the motive which led most of the young men of ability to take up their abode in the wilderness was the desire to rule, political feeling was intense. The emoluments of the offices were insignificant, but they were stepping-stones to that power of which the young men were dreaming; and they strove for them fiercely, almost ferociously. They were all lawyers, and they carried their rivalries into the courts, where they struggled like gladiators in the presence of their constituents; for almost every man in the country remained at the courthouse throughout the session.

"Here an extraordinary body of lawyers were developed, and never was there a community so dominated by its bar. They were, indeed, a speaking aristocracy in the face of a silent democracy. They were not only the idols of the people, the men on whom every eye was fixed; they not only controlled the politics of the state, and filled all the important offices, but they possessed a share of the general wealth, which is probably without example. In those days in Little Rock the generality of the citizens dwelt in small frame houses, opening upon the street; but the leaders of the bar occupied elegant mansions of brick surrounded by extensive grounds, such as Ashley Place, the Pike Place, the Fowler Place, the Crittenden Place, the Trapnall Place, the Hempstead Place, and the like.

"The practice was severe, but it had its compensations. There was never a system better calculated to produce able and efficient lawyers. All of them rode the circuit. There they could count on finding only the statutes of the state, a handful of Arkansas Reports, Blackstone's Commentaries, Greenleaf on Evidence, and Chitty on Pleading. They had slight opportunity for preparation. Often they were not retained until they reached the court. Usually the issues were not made up before their arrival. So they had to do the best with the resources at their command. The books that were there furnished the great guiding principles of the law, and these they had to apply to the case in hand. The whole field of logic was open. They had to argue from general rules to particular applications. Theirs was not the almost clerical labor of the lawyer of today, whose business it is to search through weary digests until he collects a mass of cases precisely like the one under consideration. They had only the broad foundations of the law on which to build the structure of their arguments, and they were free to build them as they chose. This made them ready and effective debaters, and the practice of arguing even questions of law before a large concourse of citizens, who took a keen interest in the fray, led to the adoption of a style of speaking clear, vigorous, forcible, and often ornate or

mpassioned beyond the tastes or requirements of to-day.

"But their training did not end here. When the cases came on appeal to Little Rock, there were libraries, which for the times and the remote locality, were remarkably large; and now the lawyers had the opportunity to test, by the touchstone of the decisions, the accuracy of their reasoning in the court below. Here they studied the books with the utmost diligence, and no one can read their briefs in the early volumes of our reports without being impressed with the thoroughness of their investigations and the vigor of their presentation.

"Thus they had every advantage in the development of their legal talents — the opportunity to argue unrestrained from the great foundation principles of the law, ample facilities to ascertain whether their reasonings had met with judicial approbation when urged before other tribunals, and the plaudits of the multitude that urged them over on to fresh exertions."

PRESUMPTION AS TO THE CHILD-BEARING PERIOD.

A question often arises in practice as to the circumstances under which the court will order the distribution of a fund on the presumption that a woman will die without issue. As a general rule such an order will not be made unless the woman is at least fifty years of age. In Graves v. Graves, 9 L. T. R. 533, the court went so far as to say that this was a settled rule of court and refused to make an order, though the woman was forty-nine, married and had no children for over twenty years, and there was also medical evidence to the effect she was physically past child-bearing. This dictum was not followed in at least two later cases, Summers. *In re*, 22 W. R. T. 39, and Miller, *In re*, L. R. 14 Eg. 245.

In the former case the woman was forty-seven years old and had six children, but none within the last seventeen years, and there was evidence that she had for fourteen years suffered from a disease which rendered child-bearing improbable, if not impossible.

Miller, *In re*, was a case of a woman who had been married twenty-six years, had no children and was then aged forty-nine years and nine months.

On the other hand, an order was refused in Conduitt v. Soane, 19 W. R. 817, at the age of fifty-two, and also in Craxton v. May, 38 L. T. R. 461, at the age of fifty-four and one-half, the lady having no children, but having been married only three years.

The order has been made in some cases subject to a recognizance on the part of the beneficiary to refund in case the presumption turns out to be unfounded. Frazer v. Frazer, Jac. 586*a*; Long v. Hodges, Jac. 585.

Other cases cited are Davis v. Bush, 8 Jur. 111*a*; Widows, *In re* L. R. 11 Eg. 408.

There is no presumption in case of a man even of the age of eighty (Trevor v. Trevor, 2 My. & K. 677), or at ninety-five (Euskington v. Boldero. 13 Bear. 1.) —*Solicitor's Journal.*

CORRESPONDENCE.

ABSENCE OF PRECEDENT AS IMPLYING A DENIAL OF REDRESS.

To the Editor of the Central Law Journal:

I wish to commend your article on "Imperfect Rights" in the last journal at page 153. I believe that the average lawyer, and judge as well, is too prone to forget that the law is a living, not a dead science. They are also likely, in their practice at least, to hark too much to the past, and their attitude to new questions implies that, notwithstanding the acknowledged inferiority of the people of five generations back in matters of science and the arts, their legal intellects were sharper and their judicial powers greater than those of to-day. It frequently suggests the question: Are our courts inferior in learning to those of our ancestors, or the legal wisdom of the twentieth century beneath that of the twelfth? I believe it true, anyway, that the absence of precedent should never mean absence of redress, for there was certainly a time when all remedies were without precedent.

Very truly yours,

COLIN P. CAMPBELL.

Grand Rapids, Mich.

HUMOR OF THE LAW.

Justice Gaynor of the Supreme Court of New York has a reputation for dry sayings not altogether devoid of humor, and one which is going the rounds among lawyers are these:

A petition for an injunction, based upon somewhat doubtful assertions of fact, recently came before the justice. After considering the affidavit of the petitioner, he remarked:

"In this case an injunction will not lie, even if the relator does."

Judge Josiah Given, the Nestor of Iowa judges, was hearing an important case recently, when at the noon adjournment the county attorney arose and requested that court adjourn until the following morning.

"I promised to take my boys to the circus this afternoon," explained the attorney.

Judge Given is almost eighty years old, but still young in many respects; and he replied:

"Well, never disappoint the boys. We'll adjourn court for a circus, but not for a ball game."

The attorney thanked the court effusively and business was suspended until the following day. That afternoon the county attorney met the judge at the circus.

"If a ball game makes me feel as young as this," said the judge, "I may have to change that ruling I made this morning."

The venerable Senator Vest, who retired in March last by reason of continued ill-health, was once a member of a commission in Missouri appointed to examine youthful applicants for admission to the bar. Among those that appeared before this commission was a young man who failed ignominiously on all that pertained to jurisprudence, case law, civil law, sumptuary law, unwritten law and due process of law. It seems that Mr. Vest, in the kindness of his heart, finally asked the youth:

"In what would you like to be examined? I am sorry to say that in everything we have questioned you on you have failed."

"I should like," replied the youngster, "to be tried on the statutes; I'm up on them."

Vest shook his head solemnly. "My dear young friend," said he, "I doubt that you will do for the law. It may be you are exceedingly familiar with the statutes, but what is to prevent a fool legislature from repealing all you know?"

"And so you were playing poker for money?" said the western judge to the prisoner at the bar.

"No, sir; we were playing for chips."

"Well, it's all the same. You got your chips cashed for money at the end of the game, I suppose."

"No, sir."

"Why, how was that?"

"At the end of the game I didn't have any chips, your Honor."

"You're discharged."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ACKNOWLEDGEMENT—Married Woman's Contract.—Under P. L. 1898, p. 670, §§ 21, 39, a married woman s unacknowledged contract to convey land held unenforceable.—Ten Eyck v. Saville, N. J., 54 Atl. Rep. 810.

2. ACKNOWLEDGMENT—Sufficiency of Evidence.—The certificate of a notary that a deed was duly acknowledged by a grantor cannot be disproved by testimony of the grantor alone.—Gritten v. Dickerson, Ill., 66 N. E. Rep. 1090.

3. ADJOINING LANDOWNERS—Obstruction to Building.—An allowance for loss of profits for the obstruction of the erection of a factory, not sustainable as alleged held not sustainable on the ground that such loss would inevitably subsequently occur.—Barnes v. Berendes, Cal., 72 Pac. Rep. 406.

4. APPEAL AND ERROR—Briefs.—A brief presented on appeal by one who has not been licensed to practice as a counselor at law will not be received.—Leaver v. Kilmer N. J., 54 Atl. Rep. 817.

5. APPEAL AND ERROR—Findings of Fact.—The supreme court will not set aside a finding of fact, though supported by the testimony of but single interested witness.—Jones v. Boatmen's Bank, Kan., 72 Pac. Rep. 391.

6 APPEAL AND ERROR—Findings of Fact.—The supreme court, on appeal from the appellate court, cannot resort to the opinion of the appellate court to ascertain facts found by it.—Martin v. Martin, Ill., 67 N. E. Rep. 1.

7. APPEAL AND ERROR—Judgment.—A minute entry directing judgment to be entered for defendant is not a judgment.—Lisker v. O'Rourke, Mont., 72 Pac. Rep. 416.

8. ASSOCIATIONS—Personal Liability.—A person acting as a committee of an unincorporated association in executing a contract for its benefit in his own name held personally liable thereon.—McKinnie v. Postles, Del., 54 Atl. Rep. 798.

9. ATTORNEY AND CLIENT — Disbarment. — The supreme court will not take original jurisdiction of disbarment proceedings, unless instituted or supported by a bar association, or the misconduct charged related to pending proceedings in such court.—*In re* Delmas, Cal., 72 Pac. Rep. 402.

10. BANKRUPTCY — Attorney's Fees. — A provision, in notes given by a bankrupt, for the payment of attorney's fees held a claim provable against the bankrupt's estate.—Merchants' Bank v. Thomas, U. S. C. C. of App., Fifth Circuit, 121 Fed. Rep. 306.

11. BANKRUPTCY—Composition. — Holders of unforeclosed mortgages against land formerly owned by a bankrupt, on which the bankrupt's liability for a deficiency was contingent, held not necessary or proper parties to a composition between the bankrupt and his creditors.—*In re* Kahn, U. S. D. C., S. D. N. Y., 121 Fed. Rep. 412.

12. BANKRUPTCY — Contractual Obligation. — Annual corporation license fee held not provable under Bankr. Act, § 63, cl. 4, Act July 1, 1898, 30 Stat. 563, U. S. Comp. St. 1901, p. 3447, as a debt founded on contract.—*In re* Danville Rolling Mill Co., U. S. D. C., E. D. Pa., 121 Fed. Rep. 432.

13. BANKRUPTCY — Insolvency. — The federal bankruptcy act exempts from its provisions a corporation seeking the benefit of the act as a voluntary bankrupt, and does not suspend the state insolvency law in that respect.—Keystone Driller Co. v. Superior Court of City and County of San Francisco, Cal., 72 Pac. Rep. 398.

14. BANKRUPTCY — Mechanic's Lien. — The voluntary bankruptcy of a building contractor, and the appointment of a trustee for his estate, before the filing of notices of lien by subcontractors, does not defeat their right to such liens under the mechanic's lien law of the state, where they perfect the same within the time allowed by the statute.—*In re* Roeber, U. S. D. C., E. D. N. Y., 121 Fed. Rep. 444.

15. BANKRUPTCY—Preference.—Preference held voidable under national bankruptcy act, if person receiving it had cause to believe it was intended as a preference.—Gamble v. Elkin, Pa., 54 Atl. Rep. 782.

16. BANKRUPTCY—Usury.—Defense of usury held available to the trustee in bankruptcy against a mortgage given by the bankrupt.—*In re* Kellogg, U. S. C. C. of App., Second Circuit, 121 Fed. Rep. 333.

17. BANKS AND BANKING — Mortgage. — An owner of mortgaged property cannot sue to enjoin sale under foreclosure, on the ground that defendant national bank had taken an assignment of the decree as a speculation.—Buchanan v. Saunders County Nat. Bank, Neb., 94 N. W. Rep. 631.

18. BANKS AND BANKING—Receiver.—Where a court has appointed a receiver of a national bank in voluntary liquidation, no action of the comptroller is required to empower such receiver to enforce the liability of the

shareholders.—King v. Pomeroy, U. S. C. C. of App., Eighth Circuit, 121 Fed. Rep. 287.

19. BENEFIT SOCIETIES—Suicide.—Where contract with mutual benefit association was silent on the subject of suicide while insane, subsequent change of by-laws could not affect member's vested rights.—Shipman v. Protected Home Circle, N. Y., 67 N. E. Rep. 83.

20. BILLS AND NOTES—Acceptance.—The mere retention of a non-negotiable bill of exchange by the drawee is not equivalent to acceptance.—Westberg v. Chicago Lumber & Coal Co., Wis., 94 N. W. Rep. 572.

21. BILLS AND NOTES—Gambling Debt.—On issue whether note was given for gambling debt, where it was shown that payee dealt on board of trade for makers, held, that it would be presumed that his transactions were in accordance with its rules.—McAveal v. Gullett, Ill., 66 N. E. Rep. 1048.

22. BILLS AND NOTES—Indorsee's Contract.—One who indorses and delivers a negotiable note in the usual course of business thereby undertakes that the signatures of all prior indorsers are genuine.—First Nat. Bank v. First Nat. Bank, Ohio, 67 N. E. Rep. 91.

23. BRIDGES—Accident to Pedestrians.—The mere fact that a person traveling on a highway after dark mistakes the wing wall of a bridge for a footpath, and falls off, is not evidence that the bridge was improperly constructed.—Weeks v. Board of Chosen Freeholders of Somerset County, N. J., 54 Atl. Rep. 826.

24. BROKERS—Usages of Exchange.—An order by a customer to a New York stockbroker to sell stock must be considered as having relation to the usages of the New York Exchange, and, where the same are shown, they will govern the rights of the parties in their relations to and dealings with each other.—Boyle v. Henning, U. S. C.C , W. D. Ky., 121 Fed. Rep. 376.

25. BUILDING AND LOAN ASSOCIATION—By-Law.—A shareholder in a building and loan association held estopped to dispute the existence of a by-law under which he made a loan, though the by-law was adopted before the enactment of the statute which authorized such by-laws.—Collins v. Cobe, Ill., 66 N. E. Rep. 1079.

26. CARRIERS—Error in Punching Transfer.—A passenger, expelled from a connecting street car for error of the conductor of the first car in punching the time of the transfer, held entitled to recover therefor in an action of tort, in the absence of contributory negligence.—Perrine v. North Jersey St. Ry. Co., N. J., 54 Atl. Rep. 799.

27. CARRIERS—Injury to Passenger.—While trains are passing a platform at a station, waiting passengers must keep such a distance from the edge of the platform next to the rail that they will not be struck by such projections as usually attach to ordinary trains.—Dotson v. Erie R. Co., N. J., 54 Atl. Rep. 827.

28. CARRIERS—Negligence.—Boarding moving train held not negligence as a matter of law.—Chicago & A. R. Co. v. Gore, Ill., 66 N. E. Rep. 1063.

29. CARRIERS—Newsboys on Cars.—Where, according to a general custom, newsboys are permitted on street cars, a boy is not a trespasser while on a car selling a paper unless his right to remain on the car has been terminated by reasonable notice.—Indianapolis St. Ry. Co. v. Hockett, Ind., 67 N. E. Rep. 106.

30. CONSTITUTIONAL LAW—Citizen's Right to Vote.—Rev. St. § 5508, U. S. Comp. St. 1901, p. 3712, is not appropriate legislation for the enforcement of the fifteenth constitutional amendment, but has no relation thereto, and will not support an indictment for conspiring to prevent a citizen from voting at a state or municipal election on account of his race or color.—Karem v. United States, U. S. C. C. of App., Sixth Circuit, 121 Fed. Rep 250.

31. CONSTITUTIONAL LAW—Freedom to Contract.—An employer, whose workmen have left him and gone on a strike, is entitled to contract with other laborers or workmen to take the place of those who have left.—Mathews v. People, Ill., 67 N. E. Rep. 28.

32. CONSTITUTIONAL LAW—Right to Construct.—The operation of a street railway is not an ordinary avocation, within the constitutional provisions securing to every individual the right to choose his own occupation and to pursue any ordinary dealing or trade.—Goddard v. Chicago & N. W. Ry. Co., Ill., 66 N. E. Rep. 1066.

33. CONSTITUTIONAL LAW—Special Franchise Act.—The special franchise act is not unconstitutional on the ground that due process of law was not observed thereunder in the taxing of the franchises.—People v. State Board of Tax Com'rs, N. Y., 67 N. E. Rep. 69.

34 CONSTITUTIONAL LAW—Statutes.—Law of 1899, requiring corporations to file certificates, etc., as a condition for doing business in the state, held not in violation of Const. U. S. Amend. 14, § 1.—Keystone Driller Co. v. Superior Court of City and County of San Francisco, Cal., 72 Pac. Rep. 398.

35. CONTEMPT—Right to Give Legal Opinion.—An attorney for a receiver is not guilty of a contempt in advising his client that in his opinion a writ of supersedeas, issued by an appellate court, commanding the receiver to restore the property in his hands, was void, where he did not advise the receiver to disobey the writ; or as to what action he should take.—*In re* Noyes, U. S. C. C. of App., Ninth Circuit, 121 Fed. Rep. 209.

36. CONTRACTS—Divisibilty.—A contract by a manufacturing concern for the purchase of all of a certain material used in its factory for five years at a fixed price per ton, to be shipped on orders as required, is entire, and not divisible.—Loudenback Fertilizer Co. v. Tennessee Phosphate Co., U S. C. C. of App., Sixth Circuit, 121 Fed. Rep. 298.

37. CONTRACTS—Nudum Pactum.—A promise by a bank's cashier to divide with the president a surplus arising from the sale of collateral held by the bank, as security for a debt of a corporation which the cashier reorganized, held *nudum pactum*.—Patton v. Wells, U. S. C. C. of App., Eighth Circuit, 121 Fed. Rep. 337.

38. CONTRACTS—Officer's Salary.—An assignment of the salary of a public officer to be earned in the future is contrary to public policy.—First Nat. Bank v. State Neb., 94 N. W. Rep. 633.

39. CONTRACTS—Public Policy.—A contract for the exclusive privilege of operating a wheel at a summer resort during the life of a patent thereon held not contrary to public policy.—Sommers v. Myers, N. J., 54 Atl. Rep. 812.

40. CORPORATIONS—Accepted Benefits.—Where a corporation accepted the benefits of a contract, and paid a large part of the consideration, it could not contest the validity of the contract after performance by the other party thereto.—Owyhee Land & Irrigation Co. v. Tautphas, U. S. C. C. of App., Ninth Circuit, 121 Fed. Rep. 343.

41. CORPORATIONS—Officer's Compensation.—President of a corporation held not entitled to compensation for extraordinary services rendered the corporation after notice to him to cease to render any services to the corporation.—Chicago Macaroni Mfg. Co. v. Boggiano, Ill., 67 N. E. Rep. 17.

42. CORPORATIONS—Time for Presentment.—Under Code Civ. Proc. § 2603, claims against estate of decedent, not presented within time limited in notice of administrator, held barred forever.—Melton v. Martin, Mont., 72 Pac. Rep. 414.

43. COSTS—Quieting Title.—Where plaintiff in a bill to quiet title did not make a sufficient tender to defendants, it was proper to require him to pay costs.—Glos v. Woodard, Ill., 67 N. E. Rep. 3.

44. COUNTIES—Street Railway.—The legislature had power to limit the authority of a county board to grant a license to incorporated companies to occupy highway for street railway purposes.—Goddard v. Chicago & N. W. Ry. Co., Ill., 66 N. E. Rep. 1066.

45. COUNTIES—Taxpayer's Suit.—Taxpayer may maintain an action against official to recover moneys illegally allowed him in excess of his fees, when the proper au-

thorities refuse to proceed against him. — Zuelly v. Casper, Ind., 67 N. E. Rep. 103.

46. COURTS — Citizenship. — The objection that the evidence is insufficient to establish plaintiff's jurisdictional allegation of citizenship cannot properly be raised by asking an instruction directing a verdict for defendant. —Southern Electric Ry. Co. v. Hageman, U. S. C. C. of App., Eighth Circuit, 121 Fed. Rep. 262.

47. CREDITORS' SUIT — Sufficiency. — On creditor's bill in aid of an execution, to set aside a transfer of property made to defraud creditors, it is sufficient that the claim has been reduced to judgment in the county where the land lies.—State Bank v. Belk, Neb., 94 N. W. Rep. 617.

48. CRIMINAL LAW — Suspension of Sentence. — Where the court had no power to suspend sentence and to permit defendant to go at large on his own recognizance, such power could not be conferred by his consent or express request.—People v. Barrett, Ill., 67 N. E. Rep. 23.

49. CRIMINAL TRIAL — Compounding a Felony. — On a trial for compounding a felony, the record of acquittal of the person charged with the crime compounded is *prima facie* evidence in favor of the person charged with compounding.—State v. Hanson, N. J., 54 Atl. Rep. 841.

50. DAMAGES — Excessive Verdict.—A verdict for $7,500 damages for a personal injury to plaintiff, amounting at most to a partial displacement or dislocation of his knee cap, held excessive.— Langbein v. Swift, U. S. C. C., W. D. Tenn., 121 Fed. Rep. 416.

51. DAMAGES—Liquidated Damages. — Designation of deposit by defendant to secure rent as liquidated damages held not conclusive where damages were easily ascertainable and deposit is out of all proportion thereto. —Cæser v. Rubinson, N. Y., 67 N. E. Rep. 58.

52. DEAD BODIES — Removal. — A widow, who buried the remains of her deceased husband in a lot belonging to his sister, held not entitled to require the owner to permit her to remove the remains. — Smith v. Shepherd, N. J., 54 Atl. Rep. 806.

53. DEATH—Measure of Damages.—In estimating damages for wrongful death under the California statute, the ages and expectancy of life of dependent beneficiaries may properly be taken into account. — The Dauntless, U. S. D. C., N. D. Cal., 121 Fed. Rep. 420.

54. DEEDS — Building Restrictions. — It is not necessarily true that a conveyance of some property in a tract without restriction will render unenforceable such restrictive clause in deeds to the rest of the property — Frink v. Hughes, Mich., 94 N. W. Rep 601.

55. DOWER—Title as Trustee.—Where a husband holds land in trust for another, his wife is not entitled to dower in the same. — Gritten v. Dickerson, Ill., 66 N. E. Rep. 1090.

56. EMINENT DOMAIN — Injunction Against Entry. — Where a failure to agree is alleged in a petition for condemnation, and is a condition precedent to the right to condemn, the fact that there was no such failure is no ground for an injunction against entry thereunder.— St. Louis & S. F. R. Co. v. Southwestern Telephone & Telegraph Co., U. S. C. C. of App., Eighth Circuit, 121 Fed. Rep. 276.

57. EQUITY—Jurisdiction.—A court of equity is without jurisdiction of a suit to construe a written contract and recover damages for its breach, where neither fraud nor mistake is alleged, nor a reformation prayed for.—Clarke v. Shirk, U. S. C. C. of App., Seventh Circuit, 121 Fed. Rep. 340.

58. EVIDENCE—Collateral Facts.—Whenever there is a conflict in the evidence, testimony as to collateral facts having a tendency to show that the statements of the witnesses on the one side are more reasonable than those on the other side is admissible. — Glassberg v. Olsen, Minn., 94 N. W. Rep. 554.

59. EVIDENCE — Expert Testimony. — A carpenter and builder, with special experience in the construction of coal stages, can testify as to the proper method of constructing certain parts of the woodwork of the stage.— Caven v. Bodwell Granite Co., Me., 54 Atl. Rep. 851.

60. EXECUTORS AND ADMINISTRATORS—Sale of Land.— Under Probate Act, § 157, and Code Civ. Proc. § 1538, on a proceeding for sale of decedent's real estate, court held to have jurisdiction of parties interested, though 30 days had not elapsed after publication of order to show cause.—*In re* Roach's Estate, Cal., 72 Pac. Rep. 393.

61. EXEMPTIONS—Legal Services.—Legal services rendered held included in the term "necessaries," under Rev. St. ch. 86, § 55, par. 6, providing that wages earned shall not be subject to trustee process, except for debts for necessaries.—Fisher v. Shea, Me., 54 Atl. Rep. 846.

62. FRAUDS, STATUTE OF — Sale of Land. — Payment of rent while making improvements held to negative the idea that possession at the time the improvements were made was under contract to purchase. — Allan v. Bemis, Iowa, 94 N. W. Rep. 560.

63. FRAUDULENT CONVEYANCES — Action to Set Aside. —An action to set aside a conveyance as fraudulent as to creditors cannot be maintained, where the judgment on which complaint is based has been paid.—Minneapolis Threshing Mach. Co. v. Jones, Minn., 94 N. W. Rep. 551.

64. GAMING — Burden of Proof. — An order by a customer to a stockbroker to sell a number of shares of stock for future delivery imports on its face a legitimate transaction by an actual sale and delivery of the stock, and the burden rests on the party alleging it to have been a gambling transaction to prove that no actual sale and delivery was intended, and that both parties so understood. — Boyle v. Henning, U. S. C. C. of App., W. D. Ky., 121 Fed. Rep. 376.

65. HOMICIDE—Felonious Assault.—Husband, sending box containing dynamite for his wife to open, held guilty of felonious assault, though she had no authority to open it.—State v. Hoot, Iowa, 94 N. W. Rep. 564.

66. HUSBAND AND WIFE — Sale of Land.—A purchaser of land from a married woman under a contract unenforceable for want of an acknowledgment held not entitled to compel a conveyance against the vendor's subsequent grantee with notice. — Ten Eyck v. Saville, N. J., 54 Atl. Rep. 810.

67. INJUNCTION — Contempt of Court. — A person may be guilty of a contempt of court in willfully doing an act which he knows the court has prohibited by injunction, although he was not a party to the suit in which the injunction was granted, and is not in privity with any of the parties.—Chisolm v. Caines, U. S. C. C., D. S. Car., 121 Fed. Rep. 397.

68. INSANE PERSONS — Liability of Estate.—The estate of an insane person may be held after her death for a claim for which she could be held in her lifetime.— Board of Chosen Freeholders of Camden County v. Ritson, N. J., 54 Atl Rep. 839.

69. INTOXICATING LIQUORS — C. O. D. Shipment. — A sale of whisky held to be completed upon delivery to a carrier for C. O. D. shipment to the party ordering it.— City of Carthage v. Duvall, Ill., 66 N. E. Rep. 1099.

70. JUDGMENT — Creditor's Bill. — Where, at an execution sale, the title which the judgment debtor had when the judgment became a lien was sold, a subsequent fraudulent transfer of the property furnishes no ground for a creditor's bill. — Newman Grove State Bank v. Linderholm, Neb., 94 N. W. Rep. 616.

71. JUDGMENT — Disclosure Commissioner.—An agreement making the payment of fees to a disclosure commissioner dependent on the collection from the judgment debtors is against public policy.—Watson v. Fales, Me., 54 Atl. Rep. 853.

72. JUDGMENT — Matters Concluded. — A decree sustaining a demurrer to a bill and dismissing the suit is an adjudication only as to the exact point raised by the pleadings and determined on the demurrer. — Dennison Mfg. Co. v. Scharf Tag, Label & Box Co., U. S. C. C. of App., Sixth Circuit, 121 Fed. Rep. 318.

73. JUDGMENT—Validity —Where a judgment has been obtained through fraud, the court may vacate it after the

term.—City of Chicago v. Nodeck, Ill., 67 N. E. Rep. 39.

74. JUDICIAL SALES—Liability of Sheriff. — Where a sheriff disobeys the statute making him sole custodian of the fund derived from the judicial sale, and pays the money to the clerk of the court, it does not impose obligations on such clerk foreign to his duties —Craw v. Abrams, Neb., 94 N. W. Rep. 639.

75. JUSTICES OF THE PEACE—Change of Venue.—Where defendant, on being granted a change of venue, refused to pay the accrued costs, as provided by Code Civ. Proc. § 1484, it was the duty of the justice of the peace to proceed with the trial.—Taney v. Vollenweider, Mont., 72 Pac. Rep. 415.

76. LANDLORD AND TENANT—Collapse of Building.—Owner of leased building, who had not used ordinary care in discovering its dangerous condition, held liable for injuries caused by its collapse, though there was no covenant to repair.—Waterhouse v. Jos. Schlitz Brewing Co., S. Dak., 94 N. W. Rep. 587.

77. LANDLORD AND TENANT—Deposit to Secure Rent.—Dispossessing tenant, where rent is secured by deposit, held to waive all claim to deposit, except to the amount necessary to apply on the rent then due.—Caeser v. Rubinson, N. Y., 67 N. E. Rep. 58.

78. LANDLORD AND TENANT—Subrogation.—Mortgagee of leasehold interest, paying rent and taxes provided by covenants in lease, held subrogated to rights of lessor.—Dunlop v. James, N. Y., 67 N. E. Rep. 60.

79. LANDLORD AND TENANT — Use of Premises. — A breach of a covenant not to use demised premises for the sale of liquor held continuing, and the acceptance of rent with knowledge of the breach did not preclude a forfeiture for a breach subsequently accruing.—Granite Bldg. Ass'n v. Greene, R. I., 54 Atl. Rep. 792.

80. LIFE INSURANCE—Application.—A statement, in an application for life policy, that the cause of a sister's death was kidney inflammation, instead of chronic pneumonia, held not a material misrepresentation.—New Era Ass'n v. Mactavish, Mich., 94 N. W. Rep. 599.

81. LIFE INSURANCE—Fraud in Procurement.—To establish fraud in procuring an insurance policy, defendant must prove that applicant's statements were knowingly untrue and made with intent to deceive.—Ley v. Metropolitan Life Ins. Co., Iowa, 94 N. W. Rep. 568.

82. MALICIOUS PROSECUTION—Wrongful Attachment.—Where an action for wrongful attachment is defended on the ground of advice of counsel, the fact that the counsel was a director of the defendant renders the issue of malice for the jury.—L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., U. S. C. C. of App., Fifth Circuit, 121 Fed. Rep. 233.

83. MALPRACTICE—Metacarpal Bone.—In an action for malpractice in removing the metacarpal bone from the hand, it is proper to ask a professional witness whether there is any method of cure without removing the bone.—Johnson v. Winston, Neb., 94 N. W. Rep. 607.

84. MANDAMUS—Clerk of Board of Aldermen.—Where a clerk of the board of aldermen refuses to comply with the resolution of such board to strike one name from the roll of members and to place another thereon, he will be compelled to do so by *mandamus* —Warmolts v. Keegan, N. J., 54 Atl. Rep. 813.

85. MARRIAGE—Annulment.—A marriage contract will be vacated, when entered into on misrepresentations by one party of material facts.—Di Lorenzo v. Di Lorenzo, N. Y., 67 N. E. Rep. 63.

86. MASTER AND SERVANT—Defective Appliances.—A servant, injured by a defective appliance, is not necessarily precluded from recovery therefor because he knew of the defect.—Hartrich v. Hawes, Ill., 67 N. E. Rep. 13.

87. MASTER AND SERVANT — Injury to Brakeman. — Where plaintiff, a brakeman, fell from the roof of a freight car because the grab iron pulled off, and the car belonged to another road, the defects were not such as that defendant employer was bound to guard against them.—Anderson v. Erie R. Co., N. J., 54 Atl. Rep. 830.

88. MASTER AND SERVANT—Injury to Servant.—In an action by an employee against a railroad for injuries received while coupling cars, the tender of a locomotive held not a car, within meaning of St. 1895, p. 412, ch. 362, § 2, Rev. Laws, ch. 111, § 203, requiring cars to be equipped with automatic couplers.—Larabee v. New York, N. H. & H. R. Co., Mass., 66 N. E. Rep. 1032.

89. MASTER AND SERVANT—Personal Injuries.—An employee, injured by the fall of a barrel from an unrailed platform, under which she worked, might recover without showing what caused the barrel to fall.—Armour v. Golkowska, Ill., 66 N. E. Rep. 1037.

90. MECHANIC'S LIENS — Abrogation of Contract. — Where a written building contract which had been filed in the clerk's office is abrogated, and the work is done under a new parol contract, the land and building were subject to a lien for work done by a subcontractor.—Buckley v. Hann, N. J., 54 Atl. Rep. 825.

91. MONEY RECEIVED—Right of Action.—An action for money had and received will lie where defendant obtained possession of money which in equity he ought to refund.—McCormick Harvesting Mach. Co. v. Stires, Neb., 94 N. W. Rep. 629.

92. MORTGAGES— Certificate of Purchase. — Where a mortgagee, who purchased the premises at the foreclosure sale, failed to take out a deed within the statutory time, equity is powerless to grant her any relief.—Bradley v. Lightcap, Ill., 67 N. E. Rep. 45.

93. MORTGAGES—Consideration. — Where a mortgage was not given until two months after the execution and delivery of the note described therein, the note was a sufficient consideration.—Sargent v. Cooley, N. Dak., 94 N. W. Rep. 576.

94. MORTGAGES—Consideration.— A second mortgage will be set aside in an action by mortgagor as without consideration; the debt which it secured not being owned by the mortgagee at the time of its execution.—Welbon v. Webster, Minn., 94 N. W. Rep. 550.

95. MORTGAGES—Foreclosure.—In an action to foreclose a mortgage, held, that the court had authority to render a personal judgment against defendant, and to decree that the deed be set aside on payment of the judgment.—Bourke v. Hefter, Ill., 66 N. E. Rep. 1084.

96. MORTGAGES—Mortgage Sale.— A mortgagor may purchase at the mortgage sale, though the mortgagee is a trustee for him.—Coleman v. McKee, R. I., 54 Atl. Rep. 874.

97. MORTGAGES—Title Passed by Sale.—A judgment on foreclosure of a mortgage held to properly include the mortgagees' future interests in the property.—Rudd v. Travelers' Ins. Co., Ky., 73 S. W. Rep. 759.

98. MUNICIPAL CORPORATIONS — Assessments. — The court had no jurisdiction to enter a judgment of confirmation of an improvement assessment based on a void ordinance.—City of Chicago v. Nodeck, Ill., 67 N. E. Rep. 39.

99. MUNICIPAL CORPORATIONS—Invalidity of Assessment.—Where abutting owner procured assessment for levy of sidewalk to be held void, the village which had laid the sidewalk held entitled to remove it.—Platt v. Village of Oneonta, 81 N. Y. Supp. 161.

100. MUNICIPAL CORPORATIONS—Obstruction in Street.—An abutting owner cannot enjoin the use of a street by an electric light company on the ground that the ordinance granting the franchise was passed before the company came into existence. — McWethy v. Aurora Electric Light & Power Co., Ill., 67 N. E. Rep. 9.

101. MUNICIPAL CORPORATIONS — Policemen. — A city may reimburse a policeman, who pursuant to his duty to remove nuisances in the street (Acts 1860-61, p. 448, § 5), shoots at a mad steer, but hits a child, for which he is held liable.—State v. City of St. Louis, Mo., 78 S. W. Rep. 628.

102. NAVIGABLE WATERS— Wharves. — Owner of lot abutting on Lake Michigan held to have no right to build wharf on submerged land in front of his lot, not owned

by him.—Cobb v. Lincoln Park Com'rs, Ill., 67 N. E. Rep. 5.

103. NEGLIGENCE—Child Sui Juris.—Where a minor is *sui juris* in an action for injuries sustained by him, negligence of his mother cannot be imputed to him.—Over v. Missouri, K. & T. Ry. Co., Tex., 73 S. W. Rep. 535.

104. NEGLIGENCE—Imputed Negligence.—Except with respect to the relation of partnership, or of principal and agent, or of master and servant, the doctrine of imputed negligence is not in vogue in Nebraska.—Hajsek v. Chicago, B. & Q. R. Co., Neb., 94 N. W. Rep. 609.

105. NUISANCE—Liability of City.—Owner of building in Brooklyn, near entrance to New York and Brooklyn Bridge, held entitled to recover from city of New York for injuries to building from slush and dirty water blown from the bridge.—Sadlier v. City of New York, 81 N. Y. Supp. 308.

106. OFFICERS—Constitutional Law.—Home rule provision of Const. art. 10, § 2, held to protect all essential functions of local officers, and prohibit their transfer to state officers.—People v. State Board of Tax Com'rs, N. Y., 67 N. E. Rep. 69.

107. PARTNERSHIP — Consideration. — An extension of time of a firm debt and the debt of an individual partner held a sufficient consideration for the firm's promise to pay the debt of such partner.— Merchants' Bank v. Thomas, U. S. C. C. of App., Fifth Circuit, 121 Fed. Rep. 306.

108. PATENTS—Contract.—In an action to restrain owner of patent from rescinding contract with manufacturer, the defendant's answer considered, and held not to amount to admission that he should be charged with certain items.—Bates Mach. Co. v. Cookson, Ill., 66 N. E. Rep. 1093.

109. PHYSICIANS AND SURGEONS — Malpractice. — A charge, in an action for malpractice, that defendants are not liable for the consequences of an operation, if they acted in a careful and skillful manner, under the belief that it was proper, held too broad.—Johnson v. Winston, Neb., 94 N. W. Rep. 607.

110. PLEADING—Defenses.— Where plaintiffs' counsel consented to try the question of fraud in the consideration of a contract sued on, it was immaterial that such issue was not set out in the notice attached to the plea of general issue served.—Sommers v. Myers, N. J., 54 Atl. Rep. 812.

111. PRINCIPAL AND AGENT—Acts of Agent.—A commercial agency is responsible in libel for acts of its agents done in the course of its business.—Minter v. Bradstreet Co., Mo., 73 S. W. Rep. 668.

112. PRINCIPAL AND AGENT—Authority to Sell.—Parol authority of an agent to make a sale of real estate does not imply authority to receive payment therefor.—Smith v. Browne, N. Car., 43 S. E. Rep. 915.

113. PUBLIC LANDS — Powers of Commissioner. — A land commissioner held to have no power to cancel an existing lease of school lands and execute another lease to the holder of the lease so canceled. — Blevins v. Terrell, Tex., 73 S. W. Rep. 515.

114. RAILROADS — Bicyclist's Duty to Look and Listen. —A traveler on a bicycle is required to use the same care before crossing a railroad track as is a pedestrian. —Passman v. West Jersey & S. R. R., N. J., 54 Atl. Rep. 809.

115. RAILROADS — Negligence. — Sending cars by a flying switch onto a siding, without warning or adequate means to control them, held negligence. — Kansas City Southern Ry. Co. v. Moles, U. S. C. C. of App., Eighth Circuit, 121 Fed. Rep. 351.

116. RAILROADS—Negligence.—The failure of a railroad company to side-track a train at a station according to its custom held not negligence as to a traveler injured at a crossing beyond the station.—Rich v. Evansville & T. H. R. Co., Ind., 66 N. E. Rep. 1028.

117. RAILROADS — Relief Association.—An association established by a railway company, composed of its employees, under which the railway company takes charge of a relief fund collected by voluntary subscriptions for the benefit of the employees, is not contrary to public policy. — State v. Pittsburg, C., C. & St. L. Ry. Co., Ohio, 67 N. E. R p. 98.

118. REFERENCE — Costs.—The referee, on a reference to ascertain an attorney's lien, cannot award costs to the attorney against his client. — Frost v. Reinach, 81 N. Y. Supp. 246.

119. REPLEVIN — Possession of Title Deeds.—Replevin will lie for the recovery of title deeds wrongfully detained, unless the controversy involves the determination of title to the land conveyed. — Pasterfield v. Sawyer, N. Car., 43 S. E. Rep. 799.

120. SALES—Evidence.—An instrument, signed by two parties, reciting that one has sold to the other property, the title to which is at the time in the latter, is not conclusive evidence of a contract of sale. — Mensinger v. Steiner Medinger Co., Neb., 94 N. W. Rep. 633.

121. SALES — Meeting of Minds. — Where one supposes that he is buying five car loads of matches, and the other that he is selling one car load of matches, there is no sale.—Singer v. Grand Rapids Match Co., Ga., 43 S. E. Rep. 755.

122. SALES—Title.—If one agrees with another to send him goods to sell or return, the goods are the property of the latter until he exercises his option to return them. —Furst Bros. v. Commercial Bank, Ga., 43 S. E. Rep. 728.

123. SCHOOLS AND SCHOOL DISTRICTS—Construction of Contract.—A contract with a teacher to teach school for a period of one year construed to be a contract for a school year.—Williams v. Bagnelle, Cal., 72 Pac. Rep. 408.

124 SPECIFIC PERFORMANCE — Contract Lacking Mutuality. — Where a contract for the sale of land is supported by a valid consideration, and want of mutuality of remedy, held no objection to specific performance.— Lamprey v. St. Paul & C. Ry. Co., Minn., 94 N. W. Rep. 555.

125. STREET RAILROADS — Construction.—Where ordinance provided that a traction company should lay its rails within a specified time, failure to comply with the condition constituted a breach of a bond given for its performance. — Borough of Carlstadt v. City Trust & Surety Co., N. J., 54 Atl. Rep 815.

126. STREET RAILROADS — Duty to Avoid Collisions.— A motorman in charge of a street car is under the same obligation to exercise care and prudence to avoid collisions and to avoid injuring people as they are to exercise care not to get in way of cars; each having an equal right to the use of the street.—Southern Electric Ry. Co. v. Hageman, U. S. C. C. of App., Eighth Circuit, 121 Fed. Rep. 262.

127. SUBROGATION — Lien of Prior Creditor.—If a prior creditor, having security on two funds, satisfies his demand out of the fund which alone is pledged to a junior creditor, the latter will be subrogated to the former's lien on that fund which is not exhausted. — Anthes v. Schroeder, Neb., 94 N. W. Rep. 611.

128. SUBROGATION — Mortgage. — Mortgagee of leasehold interest, paying rent and taxes as provided by covenants in lease, held subrogated to rights of lessor. —Dunlop v. James, N. Y., 67 N. E. Rep. 60.

129. SUBROGATION — Mortgage. — Where one pays or advances money to pay a mortgage debt, with the understanding that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation. —Powers v. McKnight, Tex., 73 S. W. Rep. 549.

130. SUNDAY—Work of Necessity.—Transportation of a threshing machine on Sunday held not a work of "necessity," so as to exempt defendant from liability for violation of the Sunday law. — State v. Stuckey, Mo., 73 S. W. Rep. 735.

131. TAXATION—Certiorari.—In *certiorari* to review determination of city tax board, the city is not a necessary party.—*In re* Belmont, 81 N. Y. Supp. 280.

132. TAXATION — Franchise Tax.—Capital of domestic corporation, invested in letters patent, may be appraised

for the purpose of ascertaining the amount of franchise tax, the same as other property. — People v. Knight, N. Y., 67 N. E. Rep. 65.

133. TAXATION — Government Agency. — A grantee of land by the federal government for the construction of a dry dock held not exempted from state taxation on the ground that the grantee was an agency of the government. — Baltimore Shipbuilding & Dry Dock Co. v. City of Baltimore, Md., 54 Atl. Rep. 623.

134. TAXATION — Tax Sale. — A defaulting taxpayer in tax proceedings is not precluded from showing in a subsequent proceeding that county court did not have jurisdiction to render the judgments under which his land was sold.—Glos v. Woodard, Ill., 67 N. E. Rep. 3.

135. TAXATION — Transfer Tax. — A claim by the state that a conveyance of real property by a decedent in contemplation of death has escaped the transfer tax cannot be heared without notice to the grantee. — *In re* Wood's Estate, 81 N. Y. Supp. 511.

136. TENANCY IN COMMON — Adverse Possession. — Where a tenant in common openly denies the title of his cotenants, and claims the entire property, and is in possession, such holding is adverse. — Craven v. Craven, Neb., 94 N. W. Rep. 604.

137. TRADE-MARKS AND TRADE-NAMES — Unfair Competition. — A defendant held chargeable with unfair competition in adopting a corporate name similar to that of complainant, containing the name of the organizer of complainant, where no one of that name was connected with defendant, and in using such name to mark its goods, which came in competition with those of complainant. — Bissell Chilled Plow Works v. T. M. Bissell Plow Co., U. S. C. C., W. D. Mich., 121 Fed. Rep. 357.

138. TRADE UNIONS—Reinstatement of Member. — Injunction to compel reinstatement of plaintiff in a labor union vacated, where it did not appear that plaintiff had ever been a full member. — Potter v. Sheffer, 81 N. Y. Supp. 164.

139. TRIAL—Hypothetical Questions.—The rule that an objection to a witness should be specific, and not general, applies to hypothetical questions. — Chicago & E. I. R. Co. v. Wallace, Ill., 66 N. E. Rep. 1096.

140. TRUSTS—Beneficiary.— Right of wife, designated as beneficiary of employees' savings fund deposit, to same on depositor's death, held unaffected by will of depositor. — Pennsylvania R. Co. v. Stevenson, N. J., 54 Atl. Rep. 696.

141. USE AND OCCUPATION—Adverse Holding.—Plaintiff held not entitled to maintain *assumpsit* for use and occupation of real estate, where defendant claimed possession under a third party. — Adsit v. Kaufman, U. S. C. C. of App., Ninth Circuit, 121 Fed. Rep. 355.

142. VENDOR AND PURCHASER—Contract of Sale.—Vendee under contract for sale of land, where delivery of conveyance is conditioned on payment of balance of consideration, must show payment or offer of payment of such balance before he can recover the money already paid.—Leach v. Rowley, Cal., 72 Pac. Rep. 403.

143. WATERS AND WATER COURSES — Artificial Increase.—Only the actual increase resulting from the addition of water to a natural stream can be diverted, as against those entitled to its natural flow. — Buckers Irr., Mill. & Imp. Co. v. Farmers' Independent Ditch Co., Colo., 72 Pac. Rep. 49.

144. WATERS AND WATER COURSES — Vested Rights.— The abrogation by a city of an agreement permitting a power company to use the city's water could not devest the power company of vested rights acquired under the agreement.—Salt Lake City Water & Electrical Power Co. v. Salt Lake City, Utah, 71 Pac. Rep. 1067.

145. WEAPONS—Communicated Threats. — An instruction in a prosecution for carrying concealed weapons held erroneous for failing to state that defendant was not guilty if she carried the weapon because of communicated threats.—Mendin v. State, Miss., 33 So. Rep. 944.

146. WILLS—Annuity.—Where a will charges an annuity on the income of certain lands, to continue during the life of testatrix's husband, the annuity is payable at the end of each year.—Henry v. Henderson, Miss., 33 So. Rep. 960.

147. WILLS—Contest.—In a contest of the probate of a will, a record of proceedings for the appointment of a guardian over the testatrix, two years after the will was executed, is not competent evidence. — *In re* Harvey's Will, Iowa, 94 N. W. Rep. 559.

148. WILLS—Defeasable Fee.—In a devise to a son, but, should he die without leaving heirs, then to others, the word "heirs" held to mean "children."—Bradsby v. Wallace, Ill., 66 N. E. Rep. 1088.

149. WILLS—Incumbrances on Devise.—A mortgage on land conveyed and specifically devised held chargeable on the land so conveyed, and not a charge on other land of testatrix specifically devised. — *In re* Porter, Cal., 72 Pac. Rep. 173.

150. WILLS—Life Estate.—Life estate devised by will held not enlarged to a fee by a subsequent limitation on power of sale.—Metzen v. Schopp, Ill., 67 N. E. Rep. 36.

151. WILLS — Validity of Record. — Indistinctness of figure in number of year in convening order in record of probate of will held not to affect validity of record.—Brack v. Boyd, Ill., 66 N. E. Rep. 1073.

152. WITNESSES—Competency.—Witness, called by surviving executors of estate to show debt due testator and to surcharge it against the estate of deceased co-executrix, held entitled to testify as to the entire transaction with testator. — *In re* Woodbury's Estate, 81 N. Y. Supp. 503.

153. WITNESSES — Contempt. — Executor, refusing to testify as to assets in connection with transfer tax, held guilty of contempt.—*In re* Bishop, 81 N. Y. Supp. 252.

154. WITNESSES—Examination by Physicians. — In an action for injuries, it is proper not to allow defendant to show, on cross-examination of plaintiff, that he had refused to submit to an examination by physicians to be appointed by the court.—Austin & N. W. R. Co. v. Cluck, Tex., 73 S. W. Rep. 569.

155. WITNESSES — Financial Interest. — Refusal to require attorney, testifying for his client, to state his financial interest in the case, held error, under Rev. St. 1899, § 4652.—Koenig v. Union Depot Ry. Co., Mo., 73 S. W. Rep. 637.

156. WITNESSES—Interpreter.—The appointment of an interpreter for witnesses alleged to be unable to talk English, under Code Civ. Proc. § 1884, held within discretion of trial court —People v. Morine, Cal., 72 Pac. Rep. 166.

157. WITNESSES—Party in Interest.—One who makes a contract as agent is not a party in interest, so as to be disqualified as a witness, after the death of the other party.—Clark v. Thias, Mo., 73 S. W. Rep. 616.

158. WITNESSES — Privileged Matters. — Documents which are a part of the archives of a foreign consulate are privileged, and a witness cannot be compelled to disclose their contents. — Kessler v. Best, U. S. C. C., S. D. N. Y., 121 Fed. Rep. 439.

159. WITNESSES—Questions Put by Court.—In furtherance of justice, the judge may in his discretion question witnesses.—City of South Omaha v. Fennell, Neb., 94 N. W. Rep. 632.

160. WITNESSES—Responsiveness of Answer. — It was not error for the court to strike out a voluntary statement made by defendant, not responsive to the question asked him, and irrelevant to the issues in the case.—Lisker v. O'Rourke, Mont., 72 Pac. Rep. 416.

161. WITNESSES — Statement to Physician. — Under Burns' Rev. St. 1901, § 505, a request by a woman to a physician to commit an abortion, and her statement to him as to the complicity of defendant with the crime, held admissible in contradiction of woman's dying declarations.—Seifert v. State, Ind., 67 N. E. Rep. 100.